146 U.S. 117

RECORD, CASE No. 13,552.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 358. 38

THE CITY OF BELLAIRE, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE CENTRAL OHIO RAILROAD COMPANY (AS RE-ORGANIZED.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 13, 1889.

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1 *Transcript of Case No.* 274.

At a stated term of the circuit court of the United States within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Columbus, O., in said district, on the first Tuesday of June, being also the fifth day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*, Defendants. } No. 274. At Law.

Be it remembered that heretofore, to wit, on the 7th day of June, A. D. 1887, came the plaintiff, The City of Bellaire, by its
2 attorneys, J. H. Gallaher and ——, and filed in the clerk's office of said court their certain transcript from the common pleas court of Belmont county, State of Ohio, in this cause. Said transcript is in the words and figures following, to wit:

Transcript.

Pleas before the court of common pleas within and for the county of Belmont and State of Ohio, at a term thereof began and held in the court-house of said county, on Tuesday, the 26th day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

THE CITY OF BELLAIRE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.* } No. 4282. App. 27, p. 266

Be it remembered that heretofore, to wit, on the 5th day of May, 1887, came the plaintiff, The City of Bellaire, by M. E. Pearson, city solicitor, and J. A. Gallaher, attorneys for plaintiff, and filed in the clerk's office of said court its certain application to appropriate property and assess compensation; which application is as follows, to wit:

THE STATE OF OHIO, } ss:
Belmont County, }

Court of Common Pleas.

3 THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY and THE CENTRAL OHIO RAILROAD COMPANY, as Reorganized, Defendants.

Application to Appropriate Property and Assess Compensation.

The plaintiff says it is a municipal corporation of the State of Ohio, a city of the second class; that its city council, by resolution and ordinance duly passed on the 5th day of April, 1887, with the concurrence of more than two-thirds of all the members elected to said council, and in all respects in accordance with law, did declare that it was deemed necessary to condemn and appropriate for public use for street purposes and for the purpose of opening Belmont street, in said city, across the tracks of said defendants the following-described property, to wit:

Beginning for the same at a point on the south line of Crescent street, in said city, where the west line of Belmont street projected southwardly would intersect the same, thence eastwardly with the south line of Cres-ent St. 81 feet to a point where the east line of Belmont street projected southwardly would intersect the said south line of Crescent street; thence southwardly one hundred and sixty-three feet to a point on the north boundary line of 29th street
4 where the east line of Belmont street, in Old Bellaire, projected northwardly would intersect said north line of 29th street; thence westwardly with the north line of 29th street $62\frac{5}{10}$ feet to a point where the west line of Belmont street, in Old Bellaire, projected northwardly would intersect said north line of 29th street; thence northwardly in a direct line to the place of beginning, containing $\frac{28}{100}$ of an acre, as is more fully shown by a map herewith filed, marked "Exhibit A," and by said resolution and ordinance said city did declare its intention to condemn and appropriate for the purpose aforesaid the property above described.

Said Baltimore and Ohio Railroad Co. is a corporation of the State of Maryland operating a railroad extending through said county of Belmont, and said Central Ohio Railroad Company, as reorganized, is a corporation of the State of Ohio, and said defendants claim to be the owners, legal and equitable, of the property above described, but as to the proportionate interest of each of said defendants this plaintiff is not advised. The plaintiff says that it desires to appropriate and use said parcel of land only so far as may be necessary for the opening and extending of said street across said parcel of land at grade and using said street so opened as one of the public streets of said city and not to interfere with the use of said land by said defendants further than may be necessary for the above purpose.

5 Wherefore said plaintiff files this its application and asks the court that all such proceedings as are necessary and proper for the condemnation and appropriation of said property to the use of said city for the purpose aforesaid may be instituted and carried on; that a jury may be empaneled for an inquiry and assessment of compensation to be paid by said city of Bellaire for said property, and that upon its complying with the requirements of the law possession of said parcel of land may be given this plaintiff so far as may be necessary for opening, extending, and using said street.

M. E. PEARSON, *City Solicitor.*
J. A. GALLAHER,
Attorney for Plaintiff.

STATE OF OHIO, }
Belmont County, } *ss:*

W. H. Brown, first being duly sworn, says he is mayor of the city of Bellaire, and that the facts set forth in the foregoing application are true, as he believes.

W. H. BROWN.

Subscribed and sworn to before me this 4th day of May, A. D. 1887.

[L. S.] GEORGE M. WOODBRIDGE.
Notary Public.

And on the same day came the plaintiff, by its said attorneys, and filed in the clerk's office of said court a præcipe for notice to issue; which præcipe is as follows, to wit:

6 Belmont Common Pleas Court.

THE CITY OF BELLAIRE
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY and THE CENTRAL OHIO RAILROAD COMPANY, as Reorganized.

Præcipe.

Clerk will issue notice to the defendants above named, notifying them that the plaintiff will apply to said court on the 18th day of May, 1887, at 10 o'clock a. m., for the appropriation of the premises in the petition described, for the empaneling of a jury to assess the compensation to be paid therefor, and for all other proceedings that may be necessary to or proper to condemn and appropriate said land. The notice for the Baltimore and Ohio R. R. Co. is to be issued to the sheriff of Belmont county and for the Central Ohio Railroad Co., as Reorganized, to the sheriff of Franklin county.

M. E. PEARSON, *City Solicitor.*
J. H. GALLAHER,
Attorney for Plaintiff.

Thereupon, on the præcipe of the attorneys for the plaintiff, there issued out of the clerk's office of said court to the sheriff of Belmont county, Ohio, the following notice, to wit:

STATE OF OHIO, } ss:
Belmont Co., }

Court of Common Pleas.

To the sheriff of Belmont county, Ohio, Greeting:

You are hereby commanded to notify The Baltimore and
7 Ohio Railroad Company, defendant, that The City of Bellaire, plaintiff, will apply to said court *court* of common pleas of Belmont county, Ohio, on Wednesday, the 18th day of May, 1887, at 10 o'clock a. m., for the appropriation of the premises in the petition described as follows, to wit:

"Beginning for the same at a point on the south line of Crescent street, in said city, where the west line of Belmont St. projected southwardly would intersect the same, thence eastwardly with the south line of Crescent St. 81 feet to a point where the east line of Belmont street projected southwardly would intersect the said south line of Crescent street; thence southwardly 163 feet to a point on the north boundary line of 29th street where the east line of Belmont street, in Old Bellaire, projected northwardly would intersect said north line of 29th street; thence westwardly with the north line of 29th street 62.5 feet to a point where the west line of Belmont street, in Old Bellaire, projected northwardly would intersect said north line of 29th street; thence northwardly in direct line to the place of beginning, containing $\frac{28}{100}$ of an acre, as is more fully shown by a map herewith filed, marked "Exhibit A," and for the empaneling of a jury to assess the compensation to be paid therefor, and for all other proceedings that may be necessary to or proper to condemn and appropriate said land.

You will make due return of this notice on or before the 18th day of May, A. D. 1887.

8 Witness my signature as clerk of said court and the seal of said court, at St. Clairsville, Ohio, this 5th day of May, A. D. 1887.

WILLIAM B. CASH, *Clerk*,
By D. H. MILLIGAN, *Deputy*. [L. S.]

Also, upon the præcipe of the attorneys for the plaintiff, there was issued out of the clerk's office of said court a notice to the sheriff of Franklin county, Ohio, as follows, to wit:

STATE OF OHIO, } ss:
Belmont County, }

Court of Common Pleas.

To the sheriff of Franklin county, Ohio, Greeting:

You are hereby commanded to notify The Central Ohio Railroad Company, as reorganized, defendant, that The City of Bellaire, plain-

tiff, will apply to said court of common pleas of Belmont coun Ohio, on Wednesday, the 18th day of May, A. D. 1887, at 10 o'clock a. m., for the appropriation of the premises in the petition described as follows, to wit:

Beginning for the same at a point on the south line of Crescent St., in said city, where the west line of Belmont St. projected southwardly would intersect the same, thence eastwardly with the south line of Crescent St. 81 feet to a point where the east line of Belmont street projected southwardly would intersect the said south line of Crescent St.; thence southwardly one hundred and sixty-
9 three feet to a point on the north boundary line of 29th street where the east line of Belmont street, on Old Bellaire, projected northwardly would intersect said north line of 29th street; thence westwardly with the north line of 29th street 62.5 feet to a point where the west line of Belmont street, in Old Bellaire, projected northwardly would intersect said north line of 29th street; thence northwardly in direct line to the place of beginning, containing $\frac{28}{100}$ of an acre, as is more fully shown by a map herewith filed, marked "Exhibit A."

And for the impaneling of a jury to assess the compensation to be paid therefor, and for all other proceedings that may be necessary to or proper to condemn and appropriate said land.

You will make due return of this notice on or before the 18th day of May, A. D. 1887.

Witness my signature as clerk of said court of common pleas and the seal of said court, at St. Clairsville, Ohio, this 5th day of May, A. D. 1887.

WILLIAM B. CASH, *Clerk*,
By D. H. MILLIGAN, *Deputy*. [L. S.]

And afterward, on the 17th day of May, 1887, the said notice to the sheriff of Belmont Co., O., was returned and filed in the clerk's office of said court, with the return of the sheriff endorsed thereos as follows, to wit:

Received this writ May 5th, 1887, and, pursuant to its command, on the 14th day of May, 1887, I made service by delivering
10 to J. P. Fitzgerald, regular freight agent of the B. & O. R. R. Co. at Bellaire, Ohio, a true copy of this writ.

O. E. FOULKE, *Sheriff*.

Fees, $2.75.

And on the same day, to wit, May 17, 1887, there was filed in the clerk's office of said court the notice to the sheriff of Franklin county, Ohio, with the return of the sheriff endorsed thereon as follows, to wit:

Received this notice May 6, 1887, and on the 13th day of May, 1887, I served the within-named The Central Ohio Railroad Co., as reorganized, by delivering to James H. Collins personally a true copy of this notice.

WM. H. BARBEE, *Sheriff*,
By M. J. KERRY, *Deputy*.

Fees, $1.37.

And afterward, on the 23 day of May, 1887, at the summer term of 1887 of said court, the following proceedings were had herein and entered on the journal hereof, to wit:

On motion of the plaintiff, by its attorneys, leave is given to the sheriff of Franklin county, Ohio, to amend his return of notice herein so as to show that the said notice was served on J. H. Collins, president of the Central Ohio Railroad Co., as reorganized.

And afterward, on the 24th day of May, 1887, there was filed in the clerk's office of said court the amended return of the sheriff of Franklin county as follows, to wit:

Received this writ May 6th, 1887, and on the 13th day of May, 1887, I served the within-named Central Ohio Railroad Company, as reorganized, by delivering to James H. Collins personally a true and certified copy of this writ, who is the president of the said The Central Ohio Railroad Co., as reorganized.

11

WM. H. BARBEE, *Sheriff*,
By W. J. KERRY, *Deputy*.

And on the 17th day of May, 1887, came the defendant The Baltimore and Ohio Railroad Company, by J. H. Collins and W. F. Smith, its attorneys, and filed in the clerk's office of said court its petition for removal herein as follows, to wit:

STATE OF OHIO, *Belmont County.*

Court of Common Pleas.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE & OHIO R. R. Co. *et al.*, Defendants.

Petition for Removal.

To the honorable court of common pleas within and for the county of Belmont, in the State of Ohio:

The petition of The Baltimore and Ohio R. R. Co., a corporation of the State of Maryland, shows that your petitioner is one of the defendants in this suit, and that the same was brought by The City of Bellaire, the plaintiff, on or about 5th day of May, A. D. 1887, in the court of common pleas of Belmont county, in the State of Ohio, and that the said plaintiff is and was at the time of the bringing of this suit a municipal corporation organized under the laws of Ohio, and therefore a citizen of the State of Ohio, and that your petitioner is and was at the time of the bringing of this suit a corporation created under and by the laws of the State of Maryland, and therefore is and was at the time *b*amed a citizen of the said State of Maryland; and your petitioner further respectfully shows that the said plaintiff claims in the petition and notice in this suit the right to appropriate a portion of the lands of this defendant, used and occupied as a yard, at Bellaire, Ohio, for the

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purposes of a street, and that the matter in dispute exceeds the sum of two thousand dollars, exclusive of costs and interest.

And your petitioner further respectfully shows that this suit is brought by said plaintiff against the said defendant, demanding the appropriation of said lands so used for the purposes named as set forth in the petition of the plaintiff, which is here referred to.

And your petitioner further avers and says that there is a controversy in this suit which is wholly between the said plaintiff and this defendant, The Baltimore and Ohio Railroad, and which can be fully determined as between them.

And your petitioner further respectfully represents that this suit has not been tried, but the same is pending for trial in said court of common pleas within and for said county and State, and that your petitioner desires to remove this suit before the trial thereof into
13 the circuit court of the United States within and for the southern district of Ohio, eastern division, in pursuance of the provisions of law contained in the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and the act amendatory thereof, approved March 3d, 1887, and that the defendant is ready and willing to give such good and sufficient surety as this court may direct *from* doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by the Baltimore and Ohio Railroad Co. and J. H. Collins and J. T. Troll, in the penal sum of $1,000, conditioned according to the provisions of law hereinbefore referred to.

W. F. SMITH AND
J. H. COLLINS,
Att'ys for Defendant.

THE STATE OF OHIO, }
Hamilton County. }

Orland Smith, being duly sworn according to law, says that he has read the foregoing petition and knows the contents thereof, and that the same is true as he verily believes, and that he is third vice-president of the defendant corporation The Baltimore and Ohio Railraod Company.

ORLAND SMITH.

Sworn to before me and subscribed in my presence by Orland Smith this 14th day of May, 1887.

[L. S.]

E. REGNIER,
Notary Public, Ham. Co., O.

And on the same day came the defendant The Baltimore and Ohio Railroad Co., with J. H. Collins and J. T. Troll, its
14 sureties, and filed in the clerk's office of said court its bond herein as follows, to wit:

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD CO. *et al.*, Defendants.

Bond.

We, The Baltimore and Ohio Railroad Company and J. H. Collins and J. T. Troll, are held and firmly bound unto The City of Bellaire, the plaintiff in this suit, in the sum of one thousand dollars, to be paid to the said The City of Bellaire, its successors or assigns; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of May, 1887.

Whereas a suit was brought on or about the 5th day of May, 1887, in the court of common pleas within and for the county of Belmont, in the State of Ohio, by the said The City of Bellaire, plaintiff, against The Baltimore and Ohio Railroad Company *et al.*, defendants, and is removable into the circuit court of the United States for the southern district of Ohio, eastern division, under the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and the act amendatory thereto, approved March 3d, 1887;

And whereas the said The Baltimore and Ohio Railroad Company has filed its petition in said court of common pleas for the removal of said suit into the circuit court of the United States for the
15 southern district of Ohio, eastern division:

Now, the consideration of this obligation is such that if the above-named The Baltimore and Ohio Railroad Company shall cause to be entered in the circuit court of the United States for the southern district of Ohio, eastern division, on or before the first day of the next session thereof after the filing of said petition for removal a copy of the record in said suit and shall pay all costs that may be awarded against it thereon by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By ORLAND SMITH,
3d Vice-President of Def't.
J. H. COLLINS.
J. T. TROLL.

The above bond endorsed as follows, to wit:

The sureties to the foregoing bond are approved by me this 17th day of May, A. D. 1887.

WILLIAM B. CASH,
Clerk of Common Pleas Court, Belmont County, Ohio. [L. S.]

And afterward, on the 3rd day of June, 1887, there was filed in the clerk's office of said court the following affidavit, to wit:

16 STATE OF OHIO, *Belmont County.* }

Court of Common Pleas.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO R. R. Co. *et al.*, Defendants. } Affidavit.

THE STATE OF OHIO, *Licking County.* }

J. E. Rankin, being duly sworn according to law, deposeth and saith that he is the special agent of The Baltimore and Ohio Railroad Co., one of the defendants in the above suit; that he is duly authorized and is the proper person to make the affidavit in this case which he is now making.

And now, referring to the petition for removal heretofore filed in this case in addition to the averments therein contained, says that from prejudice or local influence it will be impossible for the said defendant, The Baltimore and Ohio Railroad Company, to obtain justice in the said court of common pleas of Belmont county, Ohio, or in any other State court to which said defendant may under the laws of the State have the right on account of such prejudice or local influence to remove said cause; and further deponent saith not.

J. E. RANKIN.

Sworn to before me and subscribed in my presence by J. E. Rankin this 2d day of June, A. D. 1887.

EDWARD KIBLER,
Notary Public in and for Licking Co., Ohio. [L. S.]

17 THE STATE OF OHIO, *Belmont County,* } *ss:*

I, William B. Cash, clerk of the common pleas court within and for said county and State aforesaid, said court being a court of record, do hereby certify the foregoing to be a full, true, and complete transcript of the record of the proceedings had *in the foregoing* up to and including June 3d, 1887, in the foregoing case of The City of Bellaire *vs.* The Baltimore and Ohio Railroad Company *et al.* in said court; and I further certify that said cause is still pending in said court, and that the case has been assigned for trial on the 9th day of June, A. D. 1887.

Witness my signature as clerk and the seal of said court, at the court-house, in St. Clairsville, Ohio, this 4th day of June, A. D. 1887.

WILLIAM B. CASH,
Clerk of Common Pleas Court of Belmont County, Ohio. [SEAL.]

(Endorsed on cover of transcript:)

I hereby acknowledge myself security for costs in this case for the Baltimore and Ohio Railroad Company. June 6, 1887. Wm. A. Hershiser.

(Here follows map marked p. 18.)

19 And afterward, to wit, on the 7th day of June, A. D. 1887, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY and THE CENTRAL OHIO RAILROAD COMPANY, as Reorganized, Defendants.

Petition.

To the circuit court of the United States for the southern district of Ohio, eastern division:

The Baltimore and Ohio Railroad Company, one of the defendants above named, here shows to the court that a suit is now pending in the court of common pleas of Belmont county, Ohio, under the title shown in the caption hereof, wherein The City of Bellaire is plaintiff and The Baltimore and Ohio Railroad Company and The Central Ohio Railroad Company, as reorganized, are defendants.

That the said plaintiff is a municipal corporation duly organized under the laws of the State of Ohio, and is therefore a citizen of the State of Ohio; that this defendant, The Baltimore and Ohio Railroad Company, is a corporation duly and properly organized under the laws of the State of Maryland, and is therefore a citizen of said State od Maryland.

20 That its codefendant herein, The Central Ohio Railroad Company, as reorganized, is a corporation duly organized under the laws of the State of Ohio, and is therefore a citizen of said State of Ohio; that the said suit above named was commenced in the court of common pleas of Belmont county, Ohio, on or about the 18th day of May, A. D. 1887, against the said defendants therein, the said Baltimore and Ohio Railroad Company & the said Central Ohio R. R. Co., as reorganized, the object and purpose of which was and is to appropriate for the purposes of a street a piece of land about sixty-two and one-half ($62\frac{1}{2}$) feet wide and about one hundred and sixty-three (163) feet long, now occupied by the said The Baltimore and Ohio Railroad Company and held by it as lessee of its codefendant herein, The Central Ohio Railroad Company, as reorganized, which land is now in the possession of the said The Baltimore and Ohio Railroad Co. and has been for more than 20 years past under a lease which extends about 20 years in the future.

That the piece of ground above described extends from the south end of Belmont street, in said city of Bellaire, directly across the railroad tracks and lands of this defendant, in this manner cutting a block or strip of land hereinbefore described; that the said lands so attempted to be appropriated are lands which are occupied by this defendant for railroad purposes, to wit, for the purposes of a yard used in making up and dispatching trains, for standing its cars thereon when not in use, for loading and unloading the same,

and for switching connections with various manufacturing
21 establishments in said city of Bellaire and for switching arrangements in connection with the lines of the Pennsylvania Co. & with those of Bellaire, Zanesville and Cincinnati Railroad Co. and of the Ohio Valley Railroad Co.; that the appropriation of said piece of land hereinbefore described will hinder, delay, adn obstruct the business of this defendant in such a manner as to render its tracks hereinbefore described of no use or value.

And this defendant says that there is a controversy between the said city of Bellaire and this defendant, in this, to wit: First, the defendant denies the right of the said city of Bellaire to appropriate the said tract of land above described, as proposed to be done in the said proceedings in suit above named. There is also a controversy between said city of Bellaire and this defendant as to the amount of compensation which should be awarded to this defendant as damages by reason of the appropriation aforesaid should it be finally decided that the said city is entitled to make the same.

And this defendant says that said suit has not been tried, but is pending for trial in the said court of common pleas of Belmont county, Ohio, and is set for trial on Thursday, June 9th, 1887.

And this defendant further avers and says that from prejudice and local influence it will not be able to obtain justice in the said court of common pleas of Belmont county, Ohio, or in any other court of the State of Ohio to which the said defendant may under the laws of said State have a right on account of such prejudice and local influence to remove the said cause.

22 And the said defendant further avers and says that the amount involved in said suit and controversy exceeds the sum of two thousand dollars, exclusive of costs and interest.

Whereupon this defendant asks that the said suit be removed from the said court of common pleas of Belmont county, Ohio, to the circuit court of the United States for the southern district of Ohio, eastern division, and that the said court of common pleas of Belmont county, Ohio, be directed to proceed no further therein.

J. H. COLLINS,
Attorney for the Baltimore and Ohio Railroad Company.

THE STATE OF OHIO, }
Licking County. }

J. E. Rankin, being duly sworn according to law, deposeth and saith that he is the special agent of The Baltimore and Ohio Railroad Company, one of the defendants in the suit above named; that as such special agent he is authorized by the said The Baltimore and Ohio Railroad Co. to make this affidavit which is now making, the same being within the scope of his duties and employment; and affiant further says that the facts stated in the foregoing petition are true.

And further deponent saith not.

J. E. RANKIN.

Sworn to before me and subscribed in my presence by J. E. Rankin this 6th day of June, A. D. 1887.

JOHN H. GLOVER, JR.,
Notary Public in and for Licking County, State of Ohio. [SEAL.]

23 Endorsed on cover: I acknowledge myself security for the defendants' costs in the within case. Wm. A. Hershiser.

And afterwards, to wit, on the 7th day of June, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY and THE CENTRAL OHIO RAILROAD COMPANY, as Reorganized, Defendants.

Answer of the Baltimore and Ohio Railroad Co.

And now comes The Baltimore and Ohio Railroad Co., one of the defendants in the above suit, and for an answer to the application of the plaintiff herein, The City of Bellaire, says:

That the Central Ohio Railroad Company was organized under an act of the General Assembly of the State of Ohio, passed Feb. 8th, 1847, entitled "An act to incorporate the Central Ohio Railroad Company," and the several acts amendatory thereto; that under the authority contained in said act of incorporation the said Central Ohio

24 Railroad Co. constructed a railroad from the city of Columbus, in the State of Ohio, to what is now the city of Bellaire, on the west bank of the Ohio river, in Belmont county, in said State.

That said The Central Ohio Railroad Company continued to operate said railroad as a common carrier of freight and passengers from the time of the construction of said road up to the first day of December, 1866, at which time the same came into the possession of this defendant as the lessee thereof under a lease for the term of twenty years from the said first day of December, A. D. 1866, and for subsequent periods of twenty years, renewable forever.

That by the terms of said lease the same was renewable by its own terms unless one party of the other, lessor or lessee, within one year previous to any one term of twenty years gave notice of its intention to abandon the same; that such notice was not given within the year previous to December 1st, 1886, and this defendant has entered upon its second term as such lessee and is now in possession of said railroad and all of its tracks, sidings, terminals, etc., etc.

That said tracks described in said application and in said Exhibit A are a part of the system of railroad tracks extending from

said city of Columbus to said city of Bellaire and constitute what is known as the terminal facilities of the said The Central Ohio Railroad Co. in said city of Bellaire.

25 That the said tracks are now used for the purpose of switching its trains, cars, and engines in connection with its lines of railroad east of the Ohio river and with the lines of railroad of what is known as the Pennsylvania system and with the Bellaire, Zanesville & Cincinnati railroad and with the Ohio Valley railway, and they are also used for the purpose of making up trains for the several divisions of this defendant west of the Ohio river, consisting of the Central Ohio division, running from the city of Bellaire to the city of Columbus; the Straitsville division, running from the city of Newark to the town of Shawnee, and the Lake Erie division, running from the city of Newark to the city of Sandusky.

That the said Lake Erie division, being known as the Sandusky, Mansfield and Newark railroad, was leased to the said The Central Ohio Railroad Company, as reorganized, the last-named company being the successor of the said The Central Ohio Railroad Co. in the year 1868, and the said Straitsville division, being formerly known as the Newark, Somerset and Straitsville railroad, became the lessee of the said The Central Ohio Railroad Company, as reorganized, in 1872, and by virtue of said leases both of said railroads, to wit:

The Sandusky, Mansfield and Newark railroad, running from the city of Newark to the city of Sandusky, Ohio, and the said Newark, Somerset and Straitsville railroad, running from the city of Newark to the town of Shawnee, in the State of Ohio, passed into the possession of this defendant by virtue of said leases, and it is now

26 in possession of the same under said leases, running many years in the future.

That all of the business of the said three railroads and their conductors, to wit, the Central Ohio railroad, the Sandusky, Mansfield and Newark railroad, and the Newark, Somerset and Straitsville railroad, so far as relates to the freight business thereof, runs into and is transferred and distributed over the said tracks described in the application of the plaintiff herein, and it is very frequently compelled for one or more days to fill said tracks with said cars to their utmost capacity and leave the same standing upon the same.

That the lands upon which — the side tracks described in said Exhibit A to the said application of the said plaintiff were purchased by the said The Central Ohio Railroad Company about the year 1850 for the railroad purposes hereinbefore described—that is, for terminal facilities and to be used as hereinbefore stated—and that the said lands and tracks have been so used ever since, first by the said The Central Ohio Railroad Company up to December 1st, 1866, and by this defendant since that time; so that the said lands and tracks have already been purchased and appropriated to a public use by the said The Central Ohio Railroad Company and are now occupied by this defendant for the same purpose.

And this defendant says that the extension of Belmont street at grade in the said city across the said railway tracks used by

27 this defendant will be inconsistent with and destructive of the present use made of the said tracks by this defendant.

And this defendant, further answering, says that it has no knowledge with reference to the passage of the ordinance by the city council of the said city of Bellaire as stated in said application, and it therefore denies all the averments thereof with reference to the same.

J. H. COLLINS,
Att'y for Defendant.

STATE OF OHIO, }
Franklin County. }

J. E. Rankin, being duly sworn according to law, deposeth and saith that he is the special agent of The Baltimore and Ohio Railroad Co., one of the defendants in the foregoing suit, and that the facts stated in the foregoing answer are true as he believes.

J. E. RANKIN.

Sworn to before me and subscribed in my presence by J. E. Rankin this 7th day of June, A. D. 1887.

[L. S.] HENRY M. BUTLER,
Notary Public, Franklin Co., Ohio.

And afterwards, to wit, on the 11th day of June, A. D, 1887, the following answer to petition for removal, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*, Defendants. }

Answer to Petition for Removal and Motion to Remand.

28 Now comes the city of Bellaire and, for answer to the petition for removal heretofore filed in this case and the additional affidavit or supplement thereto, said city denies that the matter in dispute between said city and said Baltimore and Ohio Railroad Co. in this case exceeds the sum of two thousand dollars; and said city denies that there is a controversy in this suit which is wholly between this plaintiff and said Baltimore and Ohio Railroad Co., and this plaintiff says that the defendant The Central Ohio Railroad Co., as reorganized, is the owner of the fee in the property proposed to be appropriated and the Baltimore and Ohio Railroad Co. is the lessee thereof.

The said city of Bellaire further denies that from prejudice and local influence it will be impossible for the Baltimore and Ohio Railroad Company to obtain justice in the court of common pleas of Belmont county, Ohio, or any other State court to which said de-

fendant may, under the laws of the State, have the right for such reason to remove said cause, and said city says that all allegations of said affidavit as to prejudice and local influence are false and without foundat-on in fact.

Wherefore said city of Bellaire moves this court to remand this case to the court of common pleas of Belmont Co., Ohio, and to do all things in the premises that law and equity may require.

J. A. GALLAHER,
Att'y for the City of Bellaire.
M. E. PEARSON,
City Solicitor.

STATE OF OHIO, *Belmont County,* } *ss:*

W. H. Brown, first being duly sworn, says he is the mayor of the city of Bellaire, and that the statements made and -he facts set forth in the foregoing answer are true as he believes.

W. H. BROWN, *Mayor.*

Subscribed and sworn to before me by said W. H. Brown this 10th day of June, 1887.

GEORGE M. WOODBRIDGE, [SEAL.]
Notary Public.

29 THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } *ss:*

THE CITY OF BELLAIRE
vs.
THE B. & O. R. R. Co. *et al.*

Motion to remand.

1. The B. & O. R. R. Co. has in this case a separate controversy, which is wholly between it and the city of Bellaire and which can be fully determined as between them. This is the question of the value of the leasehold interest of the B. & O. R. R. Co. in the land which the city seeks to appropriate. This interest is wholly apart from the interest of the Central Ohio R. R. Co. in the fee, and entitled the B. & O. R. R. Co. to a separate verdict.

2. The removal is of the whole suit, and not merely of the controversy between the city of Bellaire and the B. & O. R. R. Co. The court of common pleas of Belmont county has no longer any jurisdiction of any part of the suit. Barney *v.* Latham, 103 U. S., 205; Hyde *v.* Ruble, 104 U. S., 409; Brooks *v.* Clarke, 119 U. S., 512.

The motion to remand is overruled.

GEORGE R. SAGE,
U. S. District Judge.

July 5th, 1887.

30 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing decision is truly taken and correctly copied from the journal of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my *my* hand and affixed the seal of said court, at the city of Columbus, O., this 26th day of November, A. D. 1888.

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

31 [Endorsed:] No. 274. United States circuit court, southern district of Ohio, eastern division. The City of Bellaire *vs.* The B. and O. R. R. Co. *et al.* Decision. Filed July 5, 1887. B. R. Cowen, clerk.

32 Journal B, p. 90.

And afterwards, to wit, on the 5th day of July, A. D. 1887, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

This cause came on to be heard at this term upon the motion of the plaintiff to remand the same to the court of common pleas of Belmont county and was argued by counsel, and thereupon, upon consideration thereof, the court doth overrule said motion.

And afterwards, to wit, on the 5th day of July, A. D. 1887, the following stipulation was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO. *et al.*, Defendants. }

33 It is hereby agreed by the above-named parties that the printed record in the case of The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* The City of Bellaire, defendant in error, in the supreme court of Ohio, may be used as evidence in this case in lieu of a certified copy thereof so far as relates to the court of common pleas, the district and circuit courts of Belmont county, Ohio.

The said copy of the printed record to be used so far as competent and relevant.

J. H. COLLINS,
Att'y for the B. & O. Railroad Company.

And afterwards, to wit, on the 30th day of September, A. D. 1887, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

In the Circuit Court of the U. S. for the Southern District of Ohio.

THE CITY OF BELLAIRE
vs.
B. & O. R. R. Co. & C. O. R. R. Co. } Cost Bond.

We hereby acknowledge ourselves security for costs in this case.
FRED. EBERLE. [SEAL.]
C. E. KURTZ. [SEAL.]

Taken and acknowledged before me this 28th day of Sept., 1887.
[SEAL.] W. H. BROWN,
Mayor of Bellaire, O.

34 SOUTHERN DISTRICT OF OHIO, *ss:*

We, residents of said district, do solemnly swear that after paying our just debts and liabilities we are worth ($500.00) five hundred dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

FRED. EBERLE.
C. E. KURTZ.

Sworn to and subscribed before me this 28th day of Sept., A. D. 1887.
[SEAL.] W. H. BROWN,
Mayor of Bellaire, Ohio.

And afterwards, to wit, on the 20th day of October, A. D. 1887, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Reply.

In the Circuit Court for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO. *et al.*, Def'ts. } Reply.

The plaintiff, for reply in this case, denies that the Central Ohio Railroad Company operated said railroad up to December 1st, 1866, and says that said defendant, The Central Ohio Railroad Company, as reorganized, was incorporated in 1865 and owner and operated said railroad for some months previous to December 1st, 1866, and made the lease with the Baltimore and Ohio Railroad Company

under which the latter is now in possession of said railroad
35 and under which it is now in possession of said parcel of land proposed to be appropriated. Plaintiff denies that the said Baltimore and Ohio Railroad Company is frequently compelled for one or more days to fill its tracks now at said proposed crossing with cars to their utmost capacity and leave the same standing thereon, and denies that the proposed use of said parcel of ground as a street will be inconsistent with or destructive of the present uses to which the same is put by the Baltimore and Ohio Railroad Company, except that it cannot be used to leave cars standing upon.

Previous to 1871 the main track of the Central Ohio railroad passed over the parcel of land described in the petition, but since the building of a bridge over the Ohio river at Bellaire by said Baltimore and Ohio Railroad Co., about the last-mentioned date, the tracks over said parcel of land are especially needed by said defendants only to transfer freight to the roads of the Pennsylvania Co. and the Bellaire, Zanesville and Cincinnati Railroad Co., and the land described in the petition is a small part of a farm purchased by and for the said R. R. company, and soon after the purchase thereof upon a part of said farm said Central Ohio Railroad Company laid out and caused to be laid out a town, which is now the main part of the city of Bellaire, with streets laid out, as shown on the plat filed with the petition in this case.

The plaintiff further says that in a case pending in the circuit court of Belmont county, Ohio, wherein the said Baltimore and Ohio Railroad Company was plaintiff and said City of Bellaire was defendant, and at the December term, 1885, of said court, it
36 was adjudged in substance that said railroad company did not have the right to the exclusive possession of said parcel of land as against the city of Bellaire desiring to open said Belmont street across the same, and said decision was afterward affirmed in the supreme court of Ohio.

Wherefore the plaintiff asks relief as in its petition.

M. E. PEARSON,
City Solicitor, and
J. A. GALLAHER,
Att'y- for Plaintiff.

THE STATE OF OHIO, } ss:
Belmont County, }

W. H. Brown, first being duly sworn, says that he is mayor of the city of Bellaire, Ohio, and that the facts stated in the foregoing reply are true, as he believes.

W. H. BROWN.

Subscribed and sworn to before me by said W. H. Brown this 18th day of October, A. D. 1887.

GEORGE M. WOODBRIDGE,
Notary Public. [SEAL.]

And afterwards, to wit, on the 10th day of January, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, 125.

This day came the parties, by their attorneys, and thereupon, to try the issued joined between the parties, a jury, being called, came,
37 to wit, A. W. Lynch, Seldon Bailey, Benjamin Franklin, Henry Harman, Charles Cone, Walter C. Hysell, James T. Hutchinson, William Hart, Thomas Murphy, Jr., Henry Snyder, Sr., William Purcell, and Andrew Beard, who were duly empaneled and sworn that they will justly and impartially assess according to their best judgment the amount of compensation due to the proper'-owners in the cases which will be brought before them in this proceeding by reason of the appropriation of their property described in their petition to the use of the Baltimore and Ohio Railroad Co. in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and they do further swear that they will, in assessing any damages that may occur to such property-owners by reason of the appropriation other than the compensation, further ascertain how much less valuable the remaining portion of said property will be in consequence of such appropriation, and that they would well and truly try and determine whether the appropriation of the property at question will unnecessarily interfere with the reasonable use of such land or road by the defendants or either of them; but, the testimony not being consluded, the court respited the jury until ten o'clock tomorrow morning, until which time this cause is continued.

And afterwards, to wit, on the 11th day of January, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 127.

38 In this cause plaintiff has leave to file amendment to application herein forthwith.

And afterwards, to wit, on the 11th day of January, A. D. 1888, the following amendment to application was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment to Application.

In the Circuit Court for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO. *et al.*, Defendants.

Amendment to application to appropriate property.

Now comes the plaintiff and by leave of court files this amend-

ment to its original application filed in this case, and says that the extension of Belmont street across the lands and tracks of said defendants as proposed in said application will not unnecessarily interfere with the reasonable use of said land or tracks by said defendants or either of them.

Wherefore the plaintiff prays relief as in said application.

M. E. PEARSON,
City Solicitor.

J. A. GALLAHER,
Attorney for Plaintiff.

STATE OF OHIO, }
Franklin County, } *ss:*

39 M. E. Pearson, first being duly sworn, says he is city solicitor of the city of Bellaire, and that he believes the facts set forth in the foregoing amendment to application to be true.

M. E. PEARSON,
City Solicitor.

Subscribed and sworn to before me this 11th day of Jan'y, 1888.

ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

And afterwards, to wit, on the 11th day of January, A. D. 1888, the following answer to amendment was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer to Amendment.

In the Circuit Court of the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff, }
vs.
THE BALTIMORE AND OHIO RAILROAD CO. *et al.*, Defendants. }

Answer to amendment to application to appropriate property.

And now comes the defendants, The Baltimore and Ohio Railroad Co. and The Central Ohio Railroad Company, as reorganized, and for answer to the amendment to the application to appropriate property in this case, filed herein January 11, 1888, and for answer thereto says that the statements contained therein are not true and are all denied.

C. H. KIBLER AND
J. H. COLLINS,
Att'yf for D'f't.

THE STATE OF OHIO, }
Franklin County. }

J. H. Collins, being duly sworn according to law, says that
40 he is the president of the Central Ohio railway, as reorganized, (a corporation), and that he believes the statements contained in this answer are true.

J. H. COLLINS.

Sworn to before me and subscribed in my presence by J. H. Collins this 11th day of January, A. D. 1888.

ROBERT C. GEORGI,
Dep. Cl'k U. S. Circuit Court, S. D. O. [SEAL.]

And afterward, to wit, on the 11th day of January, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Jour. B, 128.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn; and, the testimony not being concluded, the court respited the jury until to-morrow morning at 10 o'clock, to which time this cause is continued.

And afterwards, to wit, on the 12th day of January, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 128.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn herein, who having heard the evidence, the arguments of counsel, and the charge of the court, thereupon said jury retired to their room, attended by an officer of the court, to deliberate.

41 And afterward, to wit, on the 13th day of January, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 129.

This day came again the parties, by their attorneys, also the jurors heretofore empaneled and sworn herein, who, being unable to agree upon a verdict, were by the court discharged from the further consideration of this cause.

And afterwards, to wit, on the 6th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 147.

This cause came on to be heard at this term upon the demurrer of the plaintiff to the second defense in the answer of the defendant and was argued by counsel, and the court, upon consideration thereof, doth sustain said demurrer; and thereupon, the parties being present, by their attorneys, to try the issues, a jury, being called, came, to wit, Henry Logan, Henry Heinmiller, John Stout, Aaron Meilly, Leonard P. Jarvis, George Fisher, James Poindexter, Burgess Hopkins, George Trandtner, Washington James, Thomas H. Young, and John Overmeyer, who were duly empaneled and sworn; but, the testimony not being concluded at the hour of adjourn-

ment, the court respited the jury until to-morrow morning at ten o'clock, until which time this cause is continued.

And afterwards, to wit, on the 7th day of June, A. D. 1888,
42 an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 147.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein; but, the hour of adjournment having arrived and the testimony not concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 8th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 149.

This day again came the parties, by their attorneys; also the jurors heretofore empaneled and sworn herein, who, having heard the testimony, the arguments of counsel, and the charge of the court, returned the following answers to the questions put to them, viz:

1st. Would the appropriation of the premises in question unnecessarily interfere with the reasonable use of the land and road by the defendant companies or either of them?

Answer. It would.

2nd. What is the value of the interest in the land proposed to be appropriated which must be divested from the defendants in order to its use for a street?

43 Answer. Twelve hundred ($1,200) dollars.

3rd. What is the extent in value of the impairment of the defendants' yard for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it?

Answer. Forty thousand ($40,000) dollars.

Whereupon counsel for plaintiff gave notice of a motion for a new trial.

And afterward, to wit, on the 8th day of June, A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

United States Circuit Court Ohio, Southern District, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*, Defendants.

Motion for a new trial.

The plaintiff moves the court to set aside the verdict of the jury and the judgment herein for the following reasons:

1. There was error in the assessment of the amount of recovery and in the amount of damages given, the same being excessive.

44 2. Said verdict is not sustained by sufficient evidence and is contrary to law.

3. For error in excluding evidence offered — plaintiff.

4. For the several errors of law occurring at the trial and severally excepted to by the plaintiff at the time.

5. For other manifest errors apparent on the record.

GALLAHER & WOODBRIDGE,
Att'ys for Plaintiff.

And afterwards, to wit, on the 12th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 155.

The motion for new trial is overruled.

Statement of the reasons would be merely a recapitulation of the rulings made at the trial, and is therefore deemed unnecessary.

Judgment will be entered in accordance with the findings made by the jury.

SAGE, *J.*

And afterward, to wit, on the 12th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 156.

45 This cause came on to be heard upon plaintiff's motion for a new trial, which was argued by counsel and submitted to the court and by the court upon consideration overruled.

And the court proceeding to judgment upon the findings by the jury, it is ordered and adjudged as follows: That the appropriation of the premises in question would unnecessarily interfere with the reasonable use of the land and road by the defendant companies, to wit, in the land and road *by the defendant companies, to wit, in the land and road* in the pleadings described; that therefore the plaintiff is not entitled to appropriate said premises to its use; that the defend-

ants recover of the plaintiffs their costs herein expended, and that execution issue therefor.

46 And afterwards, to wit, on the 27th day of October, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 162.

This cause came on to be heard further at this term upon the motion of counsel for plaintiff to set aside the entry heretofore made herein overruling the motion for a new trial and the judgment entry made June 12th, 1888, and the court, being fully advised in the premises, doth grant said motion.

And this cause coming on to be further heard upon the motion for a new trial, the court, being fully advised in the premises, doth overrule said motion; and counsel for defendant moving for judgment on the verdict of the jury heretofore rendered herein, it is ordered, adjudged, and decreed as follows, to wit: That the appropriation of the premises in question would unnecessarily interfere with the reasonable use of the land and road by the defendant companies, to wit, in the land and road in the pleadings described; that therefore the plaintiff is not entitled to appropriate said premises to its use; that the defendants recover of the plaintiff their costs herein expended, taxed at $—, and that execution issue therefor, excepting from said costs the costs of continuance of this cause, upon defend-

47 ants' motion, from December, 1887, to January, 1888, taxed at $—, which said last-named cost are *are* hereby adjudged to be due from said defendants and execution is awarded therefor.

And upon application of counsel for plaintiff it is ordered that execution for costs herein adjudged to be due from said plaintiff be stayed for thirty days, to allow said plaintiff to prepare and present its bill of exceptions.

And afterwards, to wit, on the 27th day of October, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 163.

In this cause two bill- of exceptions are presented by counsel for plaintiff, signed, sealed, allowed, and made part of the record, and the court allows a writ of error to the supreme court, with stay of execution, upon the filing of a supersedeas bond for costs in the sum of $1,000, with good and sufficient securities to be approved by the clerk, within twenty days from this date.

48 And afterwards, to wit, on the 27th day of October, A. D. 1888, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*, Def'ts.

Bill of Exceptions.

Be it remembered that at the trial of the above case, at the June term, 1888, of said court, the plaintiff, to maintain the issues on its part, offered in evidence the record of the case of The Balti-
49 more and Ohio Railroad Co. against The City of Bellaire, a copy of which record is hereto attached, marked Exhibit "A," and is made a part of this bill of exceptions; which record the court then and there refused to admit in evidence or to submit the same to the jury; to which ruling of the court the plaintiff, by its attorneys, then and there excepted, and now prays the court to sign and seal this its bill of exceptions, and that the same may be ordered to be made a part of the record in this case, which is done accordingly at the term of said court aforesaid, and this bill of exceptions is ordered to be made a part of the record, as prayed for.

GEORGE R. SAGE,
U. S. District Judge, Southern District of Ohio, Sitting in and Holding the Circuit Court upon the Trail of the Above-Entitled Cause. [SEAL.]

July 26, 1888.

"EXHIBIT A."

In the Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD CO., Plaintiff in Error,
against
THE CITY OF BELLAIRE, Defendant in Error.

Record.

J. H. Collins, attorney for plaintiff in error.

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51 Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff,
against
THE CITY OF BELLAIRE, Defendant.

Petition in Error. (*Filed in Supreme Court Jan.* 9, 1886.)

The said plaintiff in error, The Baltimore and Ohio Railroad Company (a corporation), here shows that in the record of the proceedings of the circuit court of Belmont county, Ohio, in the cause wherein said plaintiff in error was plaintiff and the said defendant in error, The City of Bellaire (a municipal corporation), was defendant (a certified copy of the journal entries in said cause in the district court of Belmont county, Ohio, up to the time it was succeeded by said circuit court and the journal entries of said circuit court since that time are hereto attached and the original filed papers therein are herewith filed), there is manifest error, in this, to wit:

First. Said circuit court erred in sustaining the motion of defendant for a rehearing of said cause made at the June term thereof for the year 1885.

Second. Said court erred in proceeding to hear said cause at the December term, A. D. 1885, without any supplemental pleading showing the issues to be tried.

52 Third. The said court erred in rehearing issues which had been heard and determined by the district court.

Fourth. Said court erred in its finding of facts, its conclusions of law, and the judgment rendered at the December term, A. D. 1885.

Wherefore said plaintiff in error prays that said judgment, orders, and proceedings of said circuit court be reversed and held for naught, and pending this proceeding that the injunction granted by the district court at the April term thereof for the year 1879 be continued by this court.

J. H. COLLINS,
Attorney for Plaintiff in Error.

Certificate of Journal Entries.

THE STATE OF OHIO, *Belmont County,* } *ss:*

District and Circuit Courts.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff,
against
THE CITY OF BELLAIRE, Defendant.

(Filed May 15, 1885.)

I, William B. Cash, clerk of the circuit court within and for the county of Belmont and State of Ohio, do hereby certify that the following entries and judgments are truly copied from the docket and journal of said court, to wit:

Appeal.—Transcript of docket and journal entries and copy of appeal bond, with original papers, filed March 26, 1879.

53 April term, 1879.—Special finding and statement of facts by the court—Journal 1, page 274; to which defendant excepts. "Injunction heretofore allowed continued until further order of this court." Defendant excepts. Judgment against defendant for costs.

April 10, 1879.—Defendant filed motion to set aside and vacate findings and judgment of the court, and hearing of said motion continued until next term. Journal 1, page 274.

April 4, 1884.—Petition, affidavit, and notice filed, endorsed as follows, to wit: Received this writ April 3, 1884, and served the same on the same day on John Bigelow, by copy, the principal agent of the Baltimore and Ohio railroad at Bellaire, Belmont county, Ohio. P. O. Criswell, deputy sheriff.

April	22,	1884.—Affidavit of			J. H. Sullivan	filed.
"	"	"	"	"	Adam Fauple	"
"	"	"	"	"	Fred. Hecker	"
"	"	"	"	"	H. Bonarms	"
"	"	"	"	"	Jno. McCormack	"
"	"	"	"	"	Jas. Gallaher	"
"	"	"	"	"	F. J. Smith	"
"	"	"	"	"	A. W. Anderson	"
"	"	"	"	"	A. O. Mellott	"
"	"	"	"	"	J. Gordy.	"
"	"	"	"	"	A. J. Norton	"

54 June term, 1884, continued. Journal 1, page 356.

(Motion docket in circuit court; case on district court docket.)

In circuit court, motion for further hearing filed May 15, 1885, in circuit court.

Affidavit of		J. B. Darrah	filed	May	15,	1885.
"	"	C. Bippus	"	"	"	"
"	"	C. L. Poorman	"	"	"	"
"	"	J. B. Shaunifeldt	"	"	"	"
"	"	A. W. Anderson	"	"	"	"

Notice of motion filed May 15, 1885; endorsed by J. H. Collins, attorney for defendant, accepting service of notice on May 1, 1885.

Circuit court, spring term, June, 1885, motion for a new trial overruled.

Motion for rehearing granted and ordered set down for hearing at the next term of this court. Plaintiff excepts and, on its motion, thirty days from term is allowed in which to prepare bill of exceptions. Journal 1, p. 7.

Bill of exceptions signed and sealed (by Peter A. Laubie and W. H. Frazier, circuit judge) and ordered to be made a part of record in this case. Journal 1, page 12.

Fall term, 1885.—Special finding and statement of facts by the court (Journal 1, page 22). Order of injunction modified and

changed so as to restrain defendant as therein provided
55 until the 20th day of January, 1886, and no longer, and that said injunction expire and be of no force or effect on and after said 20th day of January, 1886, and that this cause be remanded to the court of common pleas for execution; to all of which plaintiff, by counsel, excepts. On motion, plaintiff is allowed thirty days in which to prepare and present a bill of exceptions. Journal 1, p. 22.

Journal Entries District Court.

April term, April 10, 1879. Journal 1, page 274.

This day came the parties, by their attorneys, and this cause came on to be heard upon the petition, answer, reply, and testimony; and the evidence and arguments of counsel having been heard, and defendant, in order to exception, having moved the court to find and state the facts, the court find as follows:

Defendant at the commencement of this suit was proceeding, by ordinance of the city council of Bellaire, in good faith, in the manner and form provided by statute, to extend and grade Belmont street, in said city, across the railway tracks used by plaintiff. The court further find that said extension and grade would be inconsistent with and destructive of the present use made of said tracks by plaintiff, and there was not at the commencement of this suit and is not now such necessity for said extension as authorized said
proceeding of the city council. It is therefore by the court
56 ordered and adjudged that the injunction heretofore allowed in this case be, and the same is, continued until further order of this court; to which finding and judgment defendant excepts. It is further ordered and adjudged that defendant pay the costs of this action, which are here adjudged against it; thereupon defendant filed a motion to set aside and vacate said findings and judgment, and said motion is continued until next term.

April term, 1884. Journal 1, page 356. Appeal.

This day this cause is continued until the next term of this court.

Journal Entries Circuit Court.

Spring term, 1885, June 20, 1885. Journal 1, page 7.

This day this cause came on to be heard upon the motion for a new trial heretofore filed by the defendant in this case, and arguments of counsel having been heard and the court, being fully advised in the premises, overrule said motion; to which ruling of the court the defendant, by counsel, excepts. Thereupon this cause came on further to be heard upon the motion of the defendant for a rehearing therein and upon the affidavits filed in support of said motion; and arguments of counsel for and against said motion having been heard and the court being fully advised in the premises, said motion is sustained and a rehearing in this case is hereby

granted, and this case is set down for hearing at the next term of this court; to which ruling of the court the plaintiff, by
57 counsel, excepts and *and* asks thirty days in which to prepare a bill of exceptions, which time is allowed by the court.

Spring term, June 22, 1885. Journal 1, page 12.

Appeal.—This day came plaintiff corporation, by its counsel, and presented to the court its bill of exceptions taken on the hearing of the motion filed by defendant herein on the 15th day of May, A. D. 1885, and, the same being examined by the court and found to be in all respects correct, the same is allowed, signed, and sealed as required by law and ordered to be made a part of the record in this case.

And the plaintiff also excepted to the order made herein at the time the same was made.

Fall term, 1885, Dec. 21, 1885. Journal 1, page 22.

This cause came on to be heard upon the application of the defendant for the modification and vacation of the injunction heretofore decreed herein by the district court and upon the original papers herein and the evidence, and was argued by counsel. Whereupon the court, upon request made, find the facts to be as follows:

First. That the Central Ohio Railroad Co., 1855, built its road through Belmont county to a point on the Ohio river immediately adjacent on the north to the town of Bellaire, which was then a town of about 200 inhabitants.

Second. That the officers of that company, for and on be-
58 half of the company, bought in fee what was known as the Harris farm, a tract of 143 acres lying adjacent to and immediately on the north *north* of said town of Bellaire, extending along the Ohio river bottom at that point and to low-water mark on the west side of the river, which runs there almost due south.

Third. That this farm, with the exception of 29½ acres reserved by the company for its own use, was laid out into lots, with streets and alleys, as part of the town of Bellaire aforesaid, and was platted and recorded and the lots were sold by the company in process of time until now they are owned by private citizens who have built stores, shops, and dwellings thereon, and it is now the center of the present city of Bellaire.

Fourth. The 29½ acres so reserved by the company is composed of a strip of land running west from the river, which at its narrowest point, at Belmont St., is 162 feet wide and extending west the width of three and one-half squares on said plat, which at this point is the width of the city; thence farther west increasing width, including bottom and hillside, with a tongue of land projecting north back of the half square on said plat from the river for the distance of about fifteen hundred feet and of the width of about two hundred feet for most of this distance.

Fifth. The strip of land running west from the river, as above

described, divides the city of Bellaire into two parts, one-third
59 of the city being south thereof, where the old town stood, and two-thirds on the north.

This strip is in the form of a half circle northward until it reaches the city limits as aforesaid, where it widens, and following its curved course on the north is a street called Crescent street and which is delineated on the plat of that part of the city so made by said company and ending at the west side of the block on west side of the city running north through what was the old town of Bellaire, as aforesaid, and parallel with each other are two streets, Union street and Belmont street, and ending at the southern boundary of the strip of land of the railroad company which divides the city as aforesaid. Belmont street is one square west of Union street, and Water street is one square east of them.

Sixth. In the new part of the town as laid out by the company as aforesaid, running north from said Crescent street and parallel with each other, are two streets and which are prolongations of Union & Belmont streets aforesaid, and the only method of communication between the two parts of the city, so divided by said railroad strip, is by an wooden bridge over the railroad strip and tracks at Union street. Guernsey street is one square west of Belmont street.

Seventh. The plaintiff has succeeded to all the rights of the Central Ohio Railroad Company and is the owner of said lands so reserved by the said company. The plaintiff's freight depot is on the bank of the river at the north end of its said strip of land, and its yard where all freight trains going west on its road are made
60 up is the strip aforesaid which divides the city as aforesaid, and the tracks follow the line of the curve of said strip as aforesaid across what would be Union and Belmont streets if prolonged. It is about one thousand feet from the said freight warehouse, around the curve to the east line of Belmont street, and about nine hundred feet from there around the westerly end of the curve to the arcade hereafter referred to and about one thousand feet directly west from Belmont street on low land of the company at the longest point to the main track of plaintiff's road, hereafter referred to. Plaintiff's freight trains average twenty-five cars to a train and the cars are from thirty to thirty-five feet in length. From five hundred to nine hundred cars pass out these tracks daily, and many trains are there made up daily, and cars are constantly standing on said tracts and at the point where Belmont street would cross.

Eighth. The main track of plaintiff's road runs through the city on an arcade leading to the bridge across the river and comes in from the southwest on high ground and strikes the arcade at a point west of Belmont St. and half way between Crescent street and the street on the north of Crescent street and on which street last referred to said arcade is boult to the river bridge, said arcade being on a curve before it reaches said street. Over this main track the passenger trains of the plaintiff run, and all freight trains from its said yard going east back out of the yard on a heavy up-
61 grade to the southwest in order to reach said main track.

Ninth. At the point where Belmont street would cross said tracks of plaintiff there are five tracks, the south track ending about one hundred feet east of the line of Belmont street at a coal shed.

Tenth. The stock yards of the plaintiff are situate along the line of its road on the hillside to the southwest of its said yard beyond the limits of the city, and at this point a car yard might be established on plaintiff's land, but it could be done only at great expense and would be at an inconvenient distance from its freight depot aforesaid. Ten additional yard tracks of, say, nine hundred feet in length could be laid on plaintiff's land adjacent to and west of Belmont street, but only at a great expense and inconvenience.

Eleventh. Extending Belmont street across said tracks at grade would materially interfere with the reasonable use of said tracks as and for a yard by plaintiff and cause great and continual inconvenience to plaintiff in its use thereof & in the performance of its business at that point.

Twelfth. The city of Bellaire, at the time of the making of the injunction order on the former hearing hereof, had a population of about 8,000. Its present *present* population is over 13,000, and the growth has been greater in that part of the city which lies south of said dividing strip and tracks, and some additional manufacturing establishments of importance have been built and estab-
62 lished in that part of the city since said order and hearing, and said city is still growing in business, population, and importance.

Thirteenth. That the extension of said Belmont street across said railroad has grown to be and is a public necessity and is now demanded by the public convenience.

Fourteenth. That the configuration of the ground at the point of intersection is such that a bridge could not be built and approaches made thereto, at the place in question, save at great expense and the substantial destruction of the use of the street to the property-owners for a square's length on each side of such bridge, and especially at the south side, as the street on that side is much lower than the street on the north side of said track. All of the lots along said streets are built upon, but the buildings on the south side are of but moderate cost. The cheapest and most practical approaches to such bridge would be by trestle-work.

Fifteenth. Configuration of the ground at the place in question is such that it would be very hard to drain and keep dry a tunnel under said tracks, and such tunnel would be constantly liable to be filled with water and debirs from overflows of the Ohio river, and would be very expensive to make and keep in passable order.

63 As the conclusion of law the court find that the *that the* defendant is entitled to have the order of the district court granting said injunction modified. It is therefore considered and adjudged by the court that the said injunction so made and ordered by the district court as aforesaid be, and the same is hereby, modified and changed so as to restrain the defendant as therein provided until the 20th day of January, 1886, and no longer, and that said

injunction expire and be of no force and effect on and after said 20th day of January, 1886.

It is further considered by the court that said defendant recover its costs in this hearing expend*ended* of said plaintiff, taxed at $——, and that this cause be remanded to the court of common pleas for execution; to all of which plaintiff excepts. Before the hearing commenced counsel for plaintiff objected and excepted to the hearing hereof or any hearing, & also objected & excepted to the introduction of any evidence herein, and on the conclusion of defendant's evidence counsel for plaintiff, still objecting and excepting as aforesaid, offered evidence under protest.

The plaintiff is allowed thirty days from term in which to prepare and present a bill of exceptions.

Duly verified.

Notice of Motion, etc.

THE STATE OF OHIO, } *ss:*
Belmont County, }

In the Circuit Court.

THE BALTIMORE AND OHIO RAILROAD CO., Plaintiff, }
vs.
THE CITY OF BELLAIRE, Defendant. }

64 (Filed May 15, 1885.)

The plaintiff, The Baltimore and Ohio Railroad Company, is hereby notified that the motion for a new trial heretofore filed by the defendant in this case will be for hearing at the June term, 1885, of said circuit court, and that the said defendant has lately filed in the clerk's office of said circuit court a motion asking a further hearing in said case, and that the order heretofore made by the district court in said case may be opened up and vacated, and notice is further given that affidavits now on file and others to be filed by May 15, 1885, will be used at the hearing of said last-mentioned motion, and that the same will be for hearing at said June term, 1885, of said circuit court.

THE CITY OF BELLAIRE,
By GEO. M. WOODBRIDGE,
City Solicitor, and
J. A. GALLAHER, *Attorney.*

I hereby accept service of the above notice by copy this 1st day of May, 1885.

J. H. COLLINS,
Attorney for Plaintiff.

Motion for a Further Hearing, etc. (*Filed May* 15, 1885.)

Now comes The City of Bellaire, the defendant in the above case, and asks the court to grant a further hearing in said case, and for cause says:

65 I. A motion for a new trial duly filed by the defendant in this case has never been heard or disposed of.

II. The population and business of said city has greatly increased since the hearing in this case in the district court, the public necessity for a crossing over said railroad is much greater than at that time, and the public interests now imperatively demand such crossing.

III. It has been found impracticable to extend said Belmont street across said railroad grounds by either bridge or tunnel.

The said defendant further asks that upon such hearing the order heretofore made in this case by the district court may be opened up and vacated, and for all other, further, and proper equitable relief.

THE CITY OF BELLAIRE,
By GEO. M. WOODBRIDGE,
City Solicitor, and
J. A. GALLAHER, *Attorney.*

66 EXHIBIT "A."

Record in district court.

Motion.

THE STATE OF OHIO, }
Belmont County. }

In the District Court.

THE BALTIMORE & OHIO RAILROAD CO., Plaintiff, }
against
THE CITY OF BELLAIRE, Defendant. }

(Filed April 10, 1879.)

The defendant moves the court to set aside and vacate their decision in this case and grant a new trial for the following causes, viz:

First. That the decision is not sustained by sufficient evidence.
Second. That the same is contrary to law.
Third. And for other causes.

D. C. DANFORD,
ST. CLAIR KELLY, AND
G. W. HOPE,
Att'ys for Def't.

Appeal Bond.

Know all men by these presents that we, The City of Bellaire and M. N. Mercer and Fred. Eberle, are held and firmly bound unto the Baltimore and Ohio Railroad Company in the penal sum of two hundred dollars; to the payment of which, well and truly to be made, we do hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators.

Signed by us and dated this 14th day of August, A. D. 1878.

67 The condition of the above obligation is such that whereas the said City of Bellaire has in an action pending in the court of common pleas of Belmont county, Ohio, wherein The Baltimore and Ohio Railroad Co. is plaintiff and The City of Bellaire is defendant, taken an appeal from a certain judgment rendered against it in favor of the said Baltimore and Ohio Railroad Co. in the court of common pleas within and for the county of Belmont, in the State of Ohio, at the summer term thereof, A. D. 1878, enjoining defendant from extending Belmont street across the railroad tracks of plaintiff at grade and for the costs of said action to the district court within and for the county aforesaid:

Now, if the said City of Bellaire shall abide and perform the order and judgment of said district court and shall pay all moneys, costs, and damages which may be required of or awarded against it by said district court, then this obligation to be void; otherwise to remain in full force and virtue in law.

(Signed) THE CITY OF BELLAIRE,
By LEVI CASSELL, *Mayor.*
[SEAL.] M. N. MERCER.
FRED. EBERLE.

I approve the above bond, with the sureties thereto, this 14th day of August, 1878.

A. C. DARRAH, *Clerk.*

68 THE BALTIMORE AND OHIO RAILROAD CO. *vs.* THE CITY OF BELLAIRE.

Injunction, petition, affidavit, allowance of injunction, undertaking, and præcipe filed November 30th, 1877.

Summons issued December 1, 1877, to the sheriff of Belmont county, Ohio, endorsed: "Injunction allowed and bond filed."

Summons returned December 12, 1877, endorsed: "Served on The City of Bellaire by delivering personally to Joel Strahl, mayor of said city, a certified copy of this writ on the 7th day of December, 1877." W. G. Kinney, sheriff.

Demurrer to petition filed January 12th, 1878.

Spring term, 1878.—Demurrer overruled and excepted to. Leave to defendand to answer in thirty days after term. (W, p. 28.)

Answer of defendant filed March 30th, 1878. Reply filed May 2, 1878.

Summer term, 1878.—Issues found for plaintiff. Temporary injunction made perpetual at costs of defendant.

Notice of appeal by defendant. Bond fixed at $200. (Jour. W, p. 156.)

Appeal bond approved and filed August 14th, 1878.

69 *Certificate of Journal Entries.*

THE STATE OF OHIO, *Belmont County*, } *ss:*

Court of Common Pleas.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff,
vs.
CITY OF BELLAIRE, Defendant.

I, A. C. Darrah, clerk of the court of common pleas within and for the county of Belmont, do hereby certify that the following entries and judgment are truly copied from the journals of said court, to wit:

Spring Term, 1878.

FEBRUARY 27TH, 1878.

This day this cause came on to be heard on the demurrer of the defendant to the petition of plaintiff and was argued by counsel; on consideration whereof, *and* the court, being fully advised in the premises, overrule said demurrer; to which ruling of the court the defendant, by its counsel, excepted. Thereupon leave is given the defendant to answer in the case in thirty days after term.

Summer Term, 1878.

JULY 17, 1878.

This day came the parties to this suit, by their attorneys, and thereupon this cause came on to be heard on the pleadings and evidence and was submitted to the court for trial; and, the evidence and arguments of counsel having been heard, *and* the court, being fully advised in the premises, find the equities of the case with the said plaintiff, and find all the allegations of said petition
70 true as therein set forth. It is thereupon ordered and adjudged that the temporary injunction heretofore allowed in this case be made perpetual, as prayed for in said petition, and said defendant is forever enjoined from proceeding in any manner to extend said Belmont street across the railroad tracks of said plaintiff on the grade thereof; and it is further ordered that said defendant pay the costs of this suit which are here adjudged against it. The defendant gives notice that it will appeal this cause to the district court; and the court, being of the opinion that this is a case for appeal, allow the same and fix the bond for such appeal at the sum of $200.

Duly verified.

Reply. (*Filed May* 2, 1878.)

The said plaintiff, for a reply to so much of the answer of defendant as requires a reply, says that it is not true that said defendant has by proper resolution and in good faith in form and manner pre-

scribed by law declared its intention to extend Belmont street across plaintiff's lands.

Plaintiff denies that defendant has proceeded according to the mode provided by law. Said extension is not a public necessity, and it cannot be made without destroying the use for which said land is now used by the plaintiff, and defendant therefore has no
71 authority to make the extension, and plaintiff says that if said tracks are used by plaintiff for the purposes now used a street crossing the same at the junction of Belmont street will result in continued and great danger to the lives of the citizens of the said city and can never be a safe crossing and will not be used as such by the citizens generally. Either it cannot be used as a street crossing or it cannot be used for the purposes for which said tracks are now used. It cannot be used for both.

J. H. COLLINS,
Attorney for Plaintiff.

Duly verified.

Answer. (*Filed March* 29, 1878.)

Defendant, for answer to the petition, says it has no direct knowledge as to the terms of the agreement between plaintiff and the Central Ohio Railroad Company, or of the lease alleged to have been made, or of the extent of the interest or right of plaintiff in the property of said Central Ohio Railroad Company, or of the nature or extent of the interest and right of plaintiff in the land described in the petition, and therefore denies said allegations and asks that plaintiff be held to proof thereof.

72 Defendant admits that said tracks or sidings are in the possession of plaintiff and are used by plaintiff as its private property as places for standing its cars or making up its trains when needed for such purposes, but denies that said land is used to the extent set up in the petition or in any other manner or for any other purposes than herein expressly admitted. Defendant denies that it was at any time "understood" by defendant or by its citizens or by said railroad company that the railroad company was not to be disturbed in the exclusive use of said track, and denies that defendant is acting or proposes to act in bad faith or in violation of any agreement or understanding.

Defendant denies that it was agreed or understood that Belmont and other streets parallel with Water street were not to be extended across said tracks and sidings of the railroad.

Defendant is a city of the second class, and its council has, by a proper resolution passed in good faith in the form and manner prescribed by law, declared its intention to extend Belmont street across the land described in the petition so as to connect the two parts of the territory of said city. Said extension is a public necessity, and defendant, as it is advised, has a lawful authority to make it
73 upon making payment of compensation to the owner of the property to be used or appropriated and payment of the damages which may be sustained by such owners.

Defendant has not intended and has not proposed or offered to make such extension without the consent of the owners of the property or payment of compensation and damages in the manner provided by law.

Defendant further says the land described in the petition is situated near the center of the territory, business, and population of the city; that it crosses the line of the principal streets, and in the present situation of the land it materially interferes with and interrupts communication between the two parts of the city.

The land claimed by plaintiff and the railroad tracks and sidings are lower than Belmont street, and on each side of said land and siding grading is required in order to make an extension of the street across the tracks on the same level. This grading can be conveniently done and without great expense, and will not unnecessarily interfere with the reasonable use of said land or of said tracks and sidings by plaintiff. Defendant says the extension of Belmont street across said land on the level of the tracks as proposed to be made by defendant will not unnecessarily interfere with the reasonable use of said road, tracks, sidings, or land by plaintiff. If such extension would interfere with the standing of cars upon that part of the land upon which the street will be located, plaintiff has other land, or can acquire it, convenient and suitable for such uses, and the extension of said street can in no way interfere with the
74 running and operation of said railroad or with the business of said railroad company.

Defendant denies that extending said street and crossing at grade will result in the destruction or subversion of the use of said tracks by plaintiff or destroy the use or uses thereof, as alleged in the petition, or that it will cause serious injury to plaintiff. Defendant says that the extension of said street across said tracks by a bridge or tunnel is unreasonable and impracticable. The only reasonable crossing is that which defendant proposes to make on a level with the tracks. Defendant denies all of the allegations in the petition of bad faith and injury to plaintiff, and says the inconvenience and danger to the public at the crossings where passenger and freight trains are run ——; and, having fully answered, defendant prays that the temporary injunction be dissolved.

ST. CLAIR KELLY,
Att'y for Defendant.

Duly verified.

Demurrer. (*Filed January* 12, 1878.)

The defendant demurs to the petition in this case, and for cause says the petition does not state facts constituting a cause of action entitling plaintiff to the relief demanded.

ST. CLAIR KELLY,
Attorney for Defendant.

75 *Petition. "A." (Filed November 30, 1877.)*

The said plaintiff, The Baltimore and Ohio Railroad Company, says that it is a corporation organized under the laws of the State of Maryland, and the defendant The City of Bellaire, formerly the incorporated village of Bellaire City, is a municipal corporation, organized under the laws of the State of Ohio and located in Belmont county, Ohio.

The plaintiff further says that the Central Ohio Railroad Co. is a corporation organized under the act of the General Assembly of the State of Ohio entitled "An act to incorporate the Central Ohio Railroad Company," passed February 8, 1847; which act is here referred to and made a part of this petition; that under said act the said Central Ohio Railroad Co. constructed a railroad known as the Central Ohio railroad, from the city of Columbus, in said State, to the said town of Bellaire, now the city of Bellaire; that at the time said railroad was located the town of Bellaire consisted of a few houses south of McMahon's creek, now known as "Old Bellaire," and north of & adjoining said town was a farm belonging to said one Ruben Harris, known as the Harris farm—a farm consisting of 143 acres of land. On the 3rd day of August, A. D. 1852, for the purpose of procuring a site upon which to locate its machine shops, depots, side tracks, and other property at said town, the said Central Ohio Railroad Company purchased of said Reuben Harris the said farm and the same was conveyed to one John Welsh as trustee for said Central Ohio Railroad Company, the object of which trust was for

76 the purpose of laying out an addition to said town of Bellaire after the necessary property for the purposes of said railroad company was conveyed to it; that on the 5th day of July, A. D. 1854, said trustee conveyed to said railroad company, in fee simple, the following tract of land, to wit, a tract of land about three hundred feet wide, commencing at the east end of what is now Central avenue, in said town, and running thence south on the western bank of the Ohio river to the commencement of what is now Crescent street, thence in the form of a circle southwest, west, northwest, and north to the west end of said Central avenue; also a triangular tract of land south of and adjoining the above tract, all making twenty-nine acres, more or less; that upon said circular tract the said R. R. company located its tracks & sidings, consisting of 6 or more tracks, & upon said triangular tract it located its roundhouse and shops.

That the remainder of said farm, situated south of said circular tract & north of same & between the two tracts running north and south as additions to said town of Bellaire, was laid out and platted by said trustee, and the lots were sold to divers persons who purchased the same with full knowledge of the rights of said railroad Co., and a municipal corporation was then organized and called the incorporated village of Bellaire city, which has since advanced to the grade of a city of the third class, the city of Bellaire; that one street, to wit, Water St., lying west of and being parallel with the

Ohio river, was extended across said circular tract by means of a bridge, and the other Sts., to wit, Belmont St., running paral-el with and being the first street west of said Water street, and the next street west, being Guernsey street, were not extended across said tracts and sidings and were not to be so extended, but south
77 of and immediately opposite said Belmont street Chestnut street extended south to McMahon creek.

And the plaintiff further says that from the time said Central Ohio Railroad Company purchased said circular tract of land it was used for the purposes of making up its trains and for tracks upon which to place its empty cars and engines when not in use up to and until December 1, 1866, when the same, with all the privileges, franchises, and vested rights of said Central Ohio Railroad Company, passed to the plaintiff as the lessee of said Central Ohio Railroad Co., and said plaintiff has been in uninterrupted possession thereof ever since and now has such possession; that in its use of said tracks and sidings located in said circular tract of land the engines and cars are continually passing and repassing the point opposite said Belmont street and frequently said tracks are all in use for the purposes aforesaid; that at the time said tracts were laid on said circular tract of land it was understood, as well by said defendant and its citizens as by said Central Ohio Railroad Company, that the latter was not to be disturbed in its exclusive use of said tracks, but said defendant, in violation of such understanding and in bad faith toward said railroad company and the plaintiff, is proceeding, by its counsel, to pass an ordinance to extend said Belmont St. across said railroad tracts so as to connect Belmont and Chestnut St., and is also threatening to make large cuts on the grade of said R. R. track level of said Belmont St. immediately east of said R. R. tracks and fills on said lands so as to cross said tracks, being much higher than said tracks. The plaintiff says that said
78 tracks can be bridged so as to connect Belmont and Chestnut streets without very serious injury to the plaintiff, but this the defendant refuses to do and claims the right and is threatening, by cuts and fills, to cross on grade, and, if permitted so to extend and connect said streets, will result in the destruction and subversion of the use of said tracks by said plaintiff for the purposes for which said tracks were originally laid and now used and destroy the use for which said lands were purchased and for which the plaintiff leased them; that in attempting to cross said tracks on grade the said defendant is acting in bad faith not only to said plaintiff, but to its own citizens, by making a crossing which will destroy the use by the plaintiff of said property and will greatly endanger the lives of its citizens by making a crossing which will always be dangerous.

The plaintiff asks that during the pendency of this suit the said defendant be enjoined from any further proceedings to extend said street across said railroad tracks, and on the final hearing thereof that said injunction be made perpetual, and for other proper relief.

J. H. COLLINS,
Attorney for Pl'ff.

Duly verified.

Certificates of Journal Entires.

THE STATE OF OHIO, } ss:
Belmont County, }

District and Circuit Courts.

79 THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff, }
against
THE CITY OF BELLAIRE, Defendant. }

I, William B. Cash, clerk of the court of common pleas within and for the county of Belmont, do hereby certify that the following entries and judgments are truly copied from the docket and journal of said court, to wit:

Docket Entries.

Appeal.—Transcript of docket and journal entries and copy of appeal bond, with original papers, filed March 26, 1879.

April term, 1879.—Special findings and statement of facts by the court (see Journal 1, p. 274); to which defendant excepts. "Injunction heretofore allowed continued until further order of this court." Defendant excepts. Judgment against defendant for costs.

April 10, 1879.—Defendant filed motion to set aside and vacate findings and judgment of the court and hearing of said motion continued until next term. Journal 1, page 274.

Record, vol. 4, p. 243. Spring term, 1879.

April 4, 1884.—Petition, affidavit, and notice filed, endorsed as follows, to wit: Received this writ April 3, 1884, and served the same on the same day on John Bigelow, by copy, the princi-
80 pal agent of the Baltimore and Ohio R. R. at Bellaire, Belmont county, Ohio. P. O. Criswell, deputy sheriff.

April 22, 1884.—Affidavit of J. H. Sullivan filed.

"	"	"	"	Adam Faupel	"
"	"	"	"	Fred. Hecker	"
"	"	"	"	H. Bonarms	"
"	"	"	"	Jno. McCormack	"
"	"	"	"	John Gallaher	"
"	"	"	"	F. J. Smith	"
"	"	"	"	A. W. Anderson	"
"	"	"	"	A. O. Mellott	"
"	"	"	"	J. Gorby	"
"	"	"	"	A. J. Norton	"

April term, 1884, continued. Journal 1, p. 357.

In circuit court. (Entries made on district court docket.)
Motion for further hearing filed May 15 in circuit court.

Affidavit of	J. B. Darrah	filed	May	15,	1885.
"	C. Bippus	"	"	"	"
"	C. L. Poorman	"	"	"	"
"	J. B. Shaunifeldt	"	"	"	"
"	A. W. Anderson	"	"	"	"

81 Notice of motion filed May 15, 1885, endorsed by J. H. Collins, attorney for plaintiff, accepting service of notice on May 1, 1885.

Circuit court, spring term, June, 1885.—Motion for new trial overruled.

Motion for rehearing granted and ordered set down for hearing at the next term of this court. Plaintiff excepts, and on its motion thirty days from term is allowed in which to prepare bill of exceptions. Journal 1, p. 7.

Bill of exceptions signed and sealed (by Peter A. Laubue and W. H. Frasier, judges circuit court) and ordered to be made a part of record in this case. Journal 1, page 12.

Journal Entries.

April term, April 10, 1879.—Appeal. This day came the parties, by their attorneys, and this cause came on to be heard upon the petition, answer, reply, and testimony, and the evidence and arguments of counsel having been heard, and defendant, in order to exception, having moved the court to find and state the facts, the court find as follows:

Defendant, at the commencement of this suit, was proceeding, by ordinance of the city council of Bellaire, in good faith, in the manner and form provided by statute, to extend and grade Belmont street, in said city, across the railway tracks used by plaintiff. The court further find that said extension and grade would be inconsistent with and destructive of the present use made of said tracks by the plaintiff, and there was not at the commencement of

82 this suit and is not now such necessity for said extension as authorized said proceedings of the city council.

It is therefore by the court ordered and adjudged that the injunction heretofore allowed in this case be, and the same is, continued until further order of this court; to which finding and judgment defendant excepts. It is further ordered and adjudged that defendant pay the costs of this action which are here adjudged against it. Thereupon defendant filed a motion to set aside and vacate said findings and judgment, and said motion is continued until next term.

April term, district court, 1884.—Appeal. This day this cause is continued until the next term of this court.

Spring term, circuit court, June 20, 1885.—This day this cause came on to be heard upon the motion for a new trial heretofore filed by defendant in this case, and arguments of counsel having been heard, and the court, being fully advised in the premises, overrules said motion; to which ruling of the court the defendant, by counsel, excepts. Thereupon this cause came on further to be heard upon the motion of the defendant for a rehearing thereon and upon the affidavits filed in support of said motion, and arguments of counsel for and against said motion having been heard, and the court, being fully advised in the premises, sustained said motion, and a rehearing in this case is hereby granted, and this case is set

down for hearing at the next term of this court; to which
83 ruling of the court the plaintiff, by counsel, excepts and asks thirty days in which to prepare a bill of exceptions, which time is allowed by the court.

Circuit court, spring term, 1885.—Appeal. This day came plaintiff corporation, by its counsel, and presented to the court its bill of exceptions taken on the hearing of the motion filed by defendant herein on the 15th day of May, A. D. 1885; and the same being examined by the court and found to be in all respects correct, the same is allowed, signed, and sealed, as required by law, and ordered to be made a part of the record in this case.

And the plaintiff also excepted to the order made herein at the time the same was made.

Duly verified.

THE STATE OF OHIO, }
City of Columbus. }

Supreme Court of the State of Ohio, January Term, A. D. 1887.

THE BALTIMORE AND OHIO RAILROAD COMPANY }
vs. }
THE CITY OF BELLAIRE. }

Error to the circuit court of Belmont county.

TUESDAY, *March* 22*d*.

This cause came on to be heard upon the transcript of the record of the circuit court of Belmont county and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and, it appearing to the court that there
84 were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $——.

Ordered that a special mandate be sent to the court of common pleas of Belmont county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Belmont county "for entry."

I, Urban H. Hester, clerk of the supreme court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this 13th day of December, A. D. 1887.

[SEAL.] URBAN H. HESTER, *Clerk*,
By HORACE M. CROW, *Deputy*.

Exhibit "A."

85 And afterwards, to wit, on the 27 day of Oct., A. D. 1888, the following 2nd bill of exceptions was filed in the clerk's

office of said court, clothed in the words and figures following, to wit:

In the United States Circuit Court for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE
vs.
THE B. & O. R. R. CO. *et al.*

Bill of Exceptions No. 2.

Be it remembered that *in* the trial of the above case, at the June term, 1888, of said court, the jury were charged as shown in Exhibit "B," hereto attached and made a part of this bill of exceptions, and not otherwise; and the plaintiff, by its counsel, then and there excepted to said charge with reference to the rights of said R. R. companies on account of the ownership of the land in fee, to the elements of damage as laid down by the court, and to the instructions as to damages to the whole yard, and also to that part of the charge that submitted the question as to the proposed appropriation unnecessarily interfering with the reasonable use of the land by the defendants.

And the plaintiff, The City of Bellaire, now prays the court to sign and seal this its bill of exceptions, and that the same may be ordered to be made a part of the record in this case, which is done accordingly at the term of said court aforesaid, and this bill of ex-
86 ceptions is ordered to be made a part of the record in this case.

GEO. R. SAGE,
U. S. District Judge, S. D. O., Sitting in and Holding the Circuit Court U. S., S. D. O., Eastern Division, in the Above-Entitled Cause. [SEAL.]

Oct. 25th, 1888.

Bill of Exceptions No. 2.

EXHIBIT "B."

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY and THE CENTRAL OHIO RAILROAD COMPANY, as Reorganized, Defendants.

Charge of the court. Revised. Geo. R. Sage.

June Term, 1888.

87 GENTLEMEN OF THE JURY: This is a proceeding, in which The City of Bellaire is plaintiff, to condemn, for the purpose

of a street crossing, certain property of the Baltimore and Ohio Railroad Company and the Central Ohio Railroad Company within the city limits of Bellaire.

For the purposes of your verdict, by agreement of counsel, the property may be treated as the property of the Baltimore and Ohio Railroad Company. The facts are that the Baltimore and Ohio Railroad Co. is the lessee of the Central Ohio Railroad Company under a lease for twenty years, with the privileges of renewals; therefore the Central Ohio Railroad Company is the owner of the land and the Baltimore and Ohio Railroad Co. of the leasehold interest; but no question arises upon that. If there did it would be necessary in estimating the damages to assess the damages in favor of the Baltimore and Ohio Railroad Company for its interest and separately in favor of the Central Ohio Railroad Co. as the owner of its interest; but, as I have said, by consent it is to be treated as one interest, and no separate assessment, therefore, need be made; so that in all respects you may treat this case as though it were a joint ownership or as though the property were owned by the Baltimore and Ohio Railroad Company.

It is a case in which the jury is not required to render a general verdict, but in which the verdict is to be special by answers to the questions submitted to the jury, to which I called your at-
88 tention at the outset and which I will read again in connection with the charge that I will give you as to the law of the case.

The first question is, Would the appropriation of the premises in question unnecessarily interfere with the reasonable use of the land and road by the defendant companies or either of them?

This question arises under the provisions of section 2233, Revised Statutes of Ohio, in which it is provided that the power to appropriate property by a municipal corporation "may be exercised for the purpose of opening or extending streets or alleys across railway tracks and lands held or owned by railway companies where such appropriation will not unnecessarily interfere with the reasonable use of such road or lands by the railway company."

Counsel for the company put the emphasis upon the word "reasonable;" counsel for the city upon the word "unnecessarily." The court puts the emphasis upon both words, for they are both to be considered.

If the appropriation can be made without an unnecessary interference with the reasonable use of the lands owned by the railroad company it may be made. If it does lead to an unnecessary interference with the reasonable use the law does not authorize the appropriation.

It was formerly held by the supreme court of Ohio in two cases that the question whether there was an unnecessary interference with the reasonable use was to be determined by the city council, and if the city council had in good faith passed an ordinance
89 providing for the appropriation that fact was conclusive upon the question to which I have just referred, and could not be opened by the court, but that is not now the law. The section to

which I have just referred you was enacted subsequently to those decisions. Now, it becomes a question of fact and the first question of fact to be determined in this case upon all the evidence whether the proposed opening of Belmont street across the yard of the defendant company, as shown by the testimony, will be an unnecessary interference with the reasonable use of that property by the railroad company.

In passing upon this question it will be your duty to look at all the testimony and all the circumstances developed upon both sides, those pertaining to the interests of the city on one hand, and on the other those pertaining to the interests of the railroad company.

Now, it has been held that the right of way which the law permits a railroad company to acquire by the exercise of what is called the right of eminent domain, which is the right to appropriate property without the consent of the owner, paying him compensation therefor, does not give to a railroad company the sole and exclusive use of that right of way, but that it is subordinate to the right of the public and the right of other railway companies to cross by highways or by tracks that line of road. I explained in passing upon that point this morning in your hearing the reasons for that rule, and I need not advert to them again.

90 In such case it has also been held that the compensation to be assessed is limited to the value of the property to the extent to which it is appropriated and does not include the expense to the railroad over whose line the crossing is demanded or constructing cattle-guards or the interruption of its trains or the expense of watchmen, if it finds it necessary to place them there. But, as I explained this morning, the property in question in this case is not a part of the right of way of the Baltimore and Ohio Railroad Co. It is not a part of the highway of that road. It is property owned in fee by the defendant companies, acquired by purchase according to law, for the law permits the acquisition of property by railroad companies for all purposes necessary for the conduct of its business.

Owning this land in fee, it has for many years been devoted to the uses of the company for what has been denominated by the witnesses a yard—that is to say, place for locating its cars, for breaking up and reconstructing its trains, for shifting cars, and those purposes incidental to the use of its track upon its line of way and necessary to enable the company to conduct its freight business. It *it* appears from the testimony that several divisions of the road of the Baltimore and Ohio Railroad Company terminate at Bellaire. Those divisions reach out from Bellaire through the State of Ohio to various points and through to points further west, to the city of Chi-

91 cago and other places still further west, and the freight business of the road from those points to points with which the divisions connect at Bellaire or beyond Bellaire converges to that city, and there the trains are made up for destination to points East, and in like manner the business coming from the East by the lines of the Baltimore and Ohio and by lines con-

necting with that road is there passed on to the lines of these several divisions for carriage to the West. You have heard the testimony of the witnesses that the actual capacity of this yard is about four hundred cars—that is to say, that the yard will contain at one time about 400 cars; that these are continually being moved in and out; that locomotives are employed in shifting and moving them, and that in the course of a day of twenty-four hours a thousand cars may be at one time or another within the limits of that yard for the purposes of the necessary transaction of the business of the road; that they come in from points west, I believe, of the crossing and are backed down over the proposed crossing to that portion of the yard which fronts upon the river, where there is a warehouse at which cars are loaded and unloaded, at which freight is shipped which is brought by the river or is transferred which is brought by the cars to be shipped by the river or by other lines, and it is a point also at which cars which are laden to be carried or transported to further points are taken from the trains in which they come into the yard and attached to other trains in which they are to go out of the yard; that the necessities of the business of the railroad company require the constant use
92 of its tracks, of which, according to my recollection, there are four, across at the point where the proposed street crossing would be located. Of those four tracks one is called the main track. This is a track running through the extreme length of the yard from one end to the other, which is kept open for the passage of locomotives to and fro and of trains as they go out. The other tracks are side tracks, upon which the cars and trains are placed and upon which the changes to which I have adverted are made; that upon the average the tracks at the proposed location of the street crossing are one or more of them used every five minutes through the day; that the location of the street across these tracks would so seriously interfere with the use of the yard as practically to destroy it. It is admitted, as I understand the testimony for the defendant, that it would not be actually impossible to use the yard, but it is the testimony of some witnesses that additional locomotives would be required; additional expense would be incurred; that constant delays would be entailed upon the company. The statute of Ohio provides that no car or locomotive shall be permitted to remain standing across any street or highway longer than five minutes at any one time; that therefore they would be compelled to break, in the technical language of railroad companies—that is, to cut apart—any train which was upon the track and open the part occupied by the street for the passage of the public.

That by reason of these interruptions and of the interference with the use of the yard for railroad purposes the property, which,
93 according to the testimony of the witnesses, is of the value of one hundred and forty to one hundred and fifty thousand dollars, would be depreciated in value fifty per cent. Perhaps there is some variation in the estimate of that depreciation, which is altogether a matter of fact, for you gentlemen to decide upon another branch of the case.

Gentlemen, I will say right here before passing further that in commenting upon these facts I do so, not for the purpose of instructing you or dictating to you what the facts are, for that is exclusively your province, but for the purpose of making clear what I have to say with reference to the law of this case, and I comment upon the facts according to my recollection. You will be guided by yours and not controlled by mine, so that if I make any mistake in reference to these facts it will be not only your right but your duty to correct it by your verdict.

Now, on the other hand, the city claims that on account of its situation it is indispensible to make this street crossing. It is admitted, it is apparent, it cannot be denied, that a crossing of some sort is a matter of necessity to the city of Bellaire.

The testimony discloses that the population of the city is from ten to twelve thousand, of which four thousand *is* located south of the yard, in what is called the old portion of Bellaire. The new portion is north of the track. The land upon which the yard is located, together with the land covered by the new portion of
94 the city, was all originally owned by the railroad company. The railroad Co. platted and sold out in lots that portion of its tract which is covered by the new portion of the city, reserving for its own use that which it included in the yard.

There is but one crossing from the old part of the city to the new over this yard. That is at Union St., which is east of Belmont street, and it is described by the witnesses as inadequate to the travel and transportation which the increasing growth and business of the city has brought about, and that it is dangerous, and that another crossing is absolutely necessary; that Belmont street is upon the north, a great thoroughfare, and the opening of a passage across the yard of the railroad company—that is to say, the completion of the street so as to make a continuous street from one end to the other—would furnish a means of access from one portion of the city to the other.

Now, that point, I think I may say, is not controverted in the case, but the real question is, How shall this crossing be made?

There are three modes suggested. One is to cross at grade—that is, upon a level of the tracks of the company at that point; another is to cross by a bridge or a viaduct, which must be eighteen and one-half feet in the clear above the track. That tunnel would have to be fifteen feet—the roadway below the tracks.

Now, I have stated the objections which the railroad company urges to the passage at grade. It is now my duty to state the
95 objections which the city of Bellaire urges to crossing by either of the other methods.

The city says that the crossing by the bridge would be expensive; that it would involve liability for damages to the owners of property upon each side of Belmont street and out to the end of the approaches to the bridge; that the bridge would necessarily, with its approaches, be eleven hundred and twelve feet in length, with a grade which would render it dangerous in icy weather, and that the

liability of frightening horses would be such as to make it extremely dangerous at all times, so that that is impracticable.

On the other hand, it is said on behalf of the railroad company that a bridge could be constructed with an approach from the south of between five and five and a half feet. That is a rise of five to five and a half feet in the hundred feet and a grade of about four feet on the north with an extreme length, including the approaches, of about nine hundred feet.

The estimate of the cost of this bridge, including the damage which would have to be paid to the adjacent landholders as claimed by the city, is somewhere between thirty and forty thousand dollars, according to Mr. Gallaher's statement of the testimony. (I do not pretend to be accurate as to the figures, but leave that entirely to you.)

The estimate of the costs of the bridge furnished in behalf of the company is somewhere, I think, between seventeen and nineteen thousand dollars.

The cost of the tunnel, it is said on behalf of the railroad company, would be something more; estimated upon the stand
96 by the witness who testified upon that subject without having made an estimate at about two thousand dollars more than the bridge.

That, it is objected by the city, would be impracticable because of the grade down into the tunnel at each end, and also because of the fact that in high water two or three times in the year the tunnel would be flooded and not only be rendered impassable, but it would be filled with the sediment from the water and be a constant source of annoyance and expense. Therefore that that is impracticable. Now, gentlemen, in passing upon the question whether the proposition of the city to cross the tracks at grade involves an unnecessary interference with the reasonable use of the yard by the railroad Co., you are to look at all of these circumstances. I will say this: It will not excuse the city in its attempt to make this crossing to say that it is necessary because it is cheap. The mere fact that another and more practicable crossing could be made, but it would involve the expenditure of a few thousand more dollars, would not entitle the city of Bellaire to shift the burden of expense and annoyance of the crossing from its own citizens to the railroad Co.

The railroad company has the same right to the use of this yard that any individual owner of land has to the use of his premises, and when it is said that the railroad company could devise other means for accommodating its business that furnishes no answer, because the railroad company has the right to use its own property in its own way, and it is not for court or jury or the city of Bellaire or anybody else to dictate to the railroad Co. how it shall use its own property.

97 But if you find that the crossing at grade is necessary, that it does not involve an unnecessary interference with the reasonable use of the property, it will be your duty to answer the first question accordingly.

If your find that it will involve such unnecessary interference, than you must so say in answer to the first question.

And that, gentlemen, is all, I think, that it is necessary to say with reference to that question.

At the outset I stated to the jury before the testimony in the case was entered upon that if the jury answered that the appropriation would unnecessarily interfere that would end the case and they need not answer the other questions, but upon reflection I have concluded to request the jury to answer all the questions without reference to that suggestion in order to avoid, in any event, the necessity of another trial upon all the questions.

So now we come to the second question: What is the value of the interest in the land proposed to be appropriated which must be diverted from the defendants in order to its use for a street?

That question requires very little explanation. That question calls upon you to state the value of the portion of the yard sought to be actually appropriated—that is, a strip eighty feet wide upon the north side of the yard property and sixty feet wide on the south side.

My recollection is that there is no conflict upon that point
98 in the testimony. I do not remember exactly what the estimate was, but it was a few hundred dollars. You will remember, gentlemen.

Now we come to the third question: What is the extent in value of the impairement of the defendants' yard for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it?

That requires you, gentlemen, to consider and answer how much the value of the entire yard, not merely the portion contiguous to this street, but through its whole extent, is impaired or would be impaired for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it.

You will have to consider, gentlemen, and I have already referred to that, how the business of the railroad Co. would be interfered with; the interruption of its trains; necessity for keeping the street open—for the proposition here is to open a highway across a private way, and remember that the city has no right, as I have already indicated, to put a stop to the use of that yard as it has been used or in any way that the company may desire to use it for railroad purposes.

There is, therefore, a proposition here to establish a highway across a private way, one running at right angles to the other, and, from the very nature of the case, the use of the highway must be, whenever it is in use, exclusive of the use *of the use* of the private way
or of the yard at that point. On the other hand, the use of
99 yard at that place must be exclusive for the time being of the use of the public. Manifestly, carriages and foot passengers cannot pass at that point while the trains of the company are passing, nor can trains of the company pass while the public is using the street.

To what extent this impairement will extend, and it is conceded

by all the witnesses that an impairement will necessarily result—to what extent is not and cannot be, from the very nature of the case, precisely stated by any witness. You have a right to look at the circumstances.

There *us* a population of four thousand on one side and a population of eight thousand on the other. Belmont street, as was stated by a witness, is a thoroughfare; and, in the language of one witness, if the street were opened across the tracks it would probably be the main thoroughfare. All the indications favor that proposition. It is not a matter which can be any more accurately determined than I have indicated.

You have heard the testimony upon that point, and it will be your duty to apply it to the answer of this question.

As I stated this morning, in passing upon the questions of law which were argued after the jury left the room yesterday evening, the railroad Co. cannot recover anything for planking the street crossing, if it be opened. That is a duty imposed by the legislature. It can recover nothing for the expense of cattle-guards. That is also a duty imposed by the statute. It can recover nothing for
100 the expense of *of* watchmen, for if it places them there it does so for its own protection, and it is not required to do so; nor can it recover specifically for the extra expense entailed in other respects by the opening of the street—that is to say, gentlemen, there was testimony that an additional locomotive and crew would be required; that delay by breaking the trains involved an expense, and an estimate of witnesses how much that would amount to in the course of a day. Now, no estimate of that sort can be allow-d as a damage, but it can be taken into account in arriving at the impairment of the value. The difference may be almost metaphysical, but nevertheless it is one established by the law. They do not recover what is costs them extra to run their trains, but they do recover—they are entitled to recover what the diminution in the value is resulting from the interference with their use and from the extra expense to which they would be put.

The fourth and last question is this: What would be the cost to the defendants to construct the crossing for the proposed street, including the necessary grading and planking and the other incidents, if any are required, to fit the crossing for the purposes of a street?

I do not think any evidence was offered specifically upon that subject. I understand that the fourth question may as well be stricken out. You need not answer the fourth question, gentlemen; so that you have those three questions to answer.

101 Now, gentlemen, there is one matter that I overlooked. It was presented by counsel for the railroad company—that is, it appears from the testimony and from the profile of the premises offered by a witness for the city that the land—that Belmont street upon the north of the proposed crossing is about ten feet above the level of the tracks—eight or ten feet, whichever you may find it to be.

That would have to be graded down, of course, if there is a cross-

ing at grade and would leave the buildings upon either side of Belmont street above the street just so far as the grade would place them. Upon the south side the land is lower than the track; and it is urged by the city that if a bridge were constructed, it would be near the tracks up to the top of the second story of the houses upon either side, and therefore would involve serious damage, which would have to be paid by the city.

Now, these two things are to be placed one against the other. If the crossing is to be at grade, there must be a cutting down of Belmont street, leaving the property on the north side above the street. Counsel for the city says that it would only leave the building up about four feet—that is to say, that they can make the cut down four ft. in fifty or eight feet in a hundred, if the crossing is on grade, and these two inconveniences are to be considered also as circumstances, one on one side and one on the other.

102 As I have said, you must be satisfied, before you find that this is a case for condemnation, that there is no unnecessary interference with the reasona-le use of the land of the railroad company at that time for the uses for which it is applied by the company before you can answer that there is no unnecessary interference.

As to these three questions, I believe that I have given you all the considerations which ought to enter into your deliberations with respect to the answers.

The constitution of Ohio provides that no person's property shall be taken for public use without full compensation, and that compensation involves not only payment for the land actually taken but whatever injury is done to the remaining premises, and that is to be taken into account in the answer to the third question.

Now, gentlemen, this is not a case in which either the court or the jury can have the slightest—can be swayed in the slightest degree by sympathy or by prejudice.

Our duty in this case is to ascertain the law and to conduct this case according to the law and the testimony. It is of no consequence to us what feeling may exist, if any, between the city of Bellaire and the railroad company. The very object of bringing cases into court is to have an impartial determination of the issues between the parties according to the law and according to the testimony, and that, after all, is the most important thing in the administration of government. Unless we can in the courts of

103 justice administer the law faithfully, truly, and impartially, it will be a matter of very little consequence who may be nominated or elected for President or governor or to the legislature or to Congress, but the due administration of the law is after all the sheet-anchor of our safety.

I feel almost like apologizing for saying even this much.

Some little references have been made to possible prejudice to be overcome or to be invoked, but I am perfectly satisfied that this jury will faithfully respond to its obligation and well and truly try this case according to the law and the evidence, putting aside every other consideration.

(Exception by plaintiff's counsel to ruling as to the rights of the company being owners in fee of the property and the elements of damages as applying to the whole yard.)

(COURT:) Gentlemen, I apply it to the whole yard just so far, and only so far, as the value of the whole yard may in your opinion be impaired by this crossing; and if it be impaired, then the company must be paid for it.

June 8th, 1888.

104 And afterwards, to wit, on the 13th day of November, A. D. 1888, the following error bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE CITY OF BELLAIRE
vs.
THE BALTIMORE AND OHIO RAILROAD CO. *et al.*

Know all men by these presents that we, The City of Bellaire, as principal, and Fred. Eberle and Fred. Rodewig, as sureties, are held and firmly bound unto the Baltimore and Ohio Railroad Company *et al.* in the sum of one thousand dollars, to be paid to the said Baltimore and Ohio R. R. Co. *et al.*, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 12th day of November, 1888.

105 Whereas the above-named The City of Bellaire has taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The City of Bellaire shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE CITY OF BELLAIRE, [SEAL.]
By W. H. BROWN, *Mayor.* [SEAL.]
FRED. EBERLE. [SEAL.]
FRED. RODEWIG. [SEAL.]

Sealed and delivered in the presence of—
G. M. WOODBRIDGE.

The above security is approved.

B. R. COWEN, *Clerk.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Fred. Eberle, one of the sureties of the above named, do solemnly swear that after paying my just debts and liabilities I am worth four thousand dollars in real estate in my own name situate in the county of Belmont, in said district.

FRED. EBERLE.

Sworn to before me the 12 day of November, 1888.

GEORGE M. WOODBRIDGE, [SEAL.]
Notary Public.

106 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Fred. Rodewig, one of the sureties of the above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand dollars in real estate in my own name situate in the county of Belmont, in said district.

FRED. RODEWIG.

Sworn to before me the 12 day of November, 1888.

GEORGE M. WOODBRIDGE, [SEAL.]
Notary Public.

107 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record in said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, O., this 16th day of November, A. D. 1888.

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

108 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The City of Bellaire and The Baltimore and Ohio Railroad Company *et al.*, a manifest error hath happened, to the great damage of the said The City of Bellaire, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of November, 1888, in the year of our Lord one thousand eight hundred and eighty-eight.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

109 [Endorsed:] United States circuit court, S. D. O., E. D. No. 274. The City of Bellaire *vs.* The B. & O. R. R. Co. *et al.* Writ of error. Filed Nov. 13th, 1888. B. R. Cowen, clerk.

110 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company and the Central Ohio Railroad Company, as reorganized, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The City of Bellaire — plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 13th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

HOWELL E. JACKSON,
Judge of the Circuit Court of the United States for the 6th Judicial Circuit.

111 [Endorsed:] United States circuit court, S. D. O., E. D. No. 274. The City of Bellaire *vs.* The B. & O. R. R. Co. *et al.* Citation to defendant in error. Filed Nov. 13th, 1888. B. R. Cowen, clerk.

Service of the within citation waived.

J. H. COLLINS,
Att'y for Def'ts in Error.

Columbus, O., Nov. 6, '88.

112 Supreme Court of the United States.

Error to the circuit court for southern district of Ohio, Eastern division.

THE CITY OF BELLAIRE, Plaintiff in Error,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY *et al.*, Defendants in Error.
} Assignment of Errors.

The plaintiff in error claims there is manifest error to its prejudice as shown by the record in this case in the following particulars:

1. Said circuit court erred in overruling the motion to remand said case to the State court.

2. Said circuit court erred in refusing to admit in evidence the record of the case of The Baltimore & Ohio Railroad Company *vs.* The City of Bellaire.

3. Said circuit court erred in its charge to the jury and in refusing to charge as requested.

4. Said circuit court erred in overruling the motion of plaintiff in error for a new trial.

5. Said court erred in excluding testimony offered by plaintiff in error and in admitting testimony offered by defendant- in error.

The plaintiff in error prays that said errors may be reviewed and that the decision of said circuit court may be reversed, and that plaintiff in error may be restored to all things it has lost thereby.

GALLAHER & WOODBRIDGE,
Att'ys for Pl'ff in Error.

Endorsed on cover: Case No. 13,552. S. Ohio C. C. U. S. No. 358. The City of Bellaire, plaintiff in error, *vs.* The Baltimore and Ohio Railroad Company and The Central Ohio Railroad Company, as reorganized. Filed May 13, 1889.

146 U.S. 117

Office Supreme Court U. S.
FILED.
OCT 3 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 13,552.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF BELLAIRE, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY AND THE CENTRAL OHIO RAILROAD COMPANY (AS REORGANIZED) DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR.

J. A. GALLAHER,
ATT'Y FOR CITY OF BELLAIRE.

1892:
Tribune Job Print, Bellaire, Ohio.

CASE No. 13,552.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF BELLAIRE, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY AND THE CENTRAL OHIO RAILROAD COMPANY (AS REORGANIZED) DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR PLAINTIFF IN ERROR.

J. A. GALLAHER,
ATT'Y FOR CITY OF BELLAIRE.

1892:
Tribune Job Print, Bellaire, Ohio.

THE CITY OF BELLAIRE, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE CENTRAL OHIO RAILROAD COMPANY (AS REORGANIZED), DEFENDANTS IN ERROR.

STATEMENT OF CASE.

The record in this case is somewhat voluminous; but the errors claimed are few. They are substantially confined to the following points:

1st. Was the B. & O. R. R. Co. entitled to remove this case from the State court?

2nd. Did the Court err in submitting to the jury the question as to the right of the City of Bellaire to make the appropriation, and in excluding from the jury the record of a previous case between the B. & O. R. R. Co. and the City of Bellaire? and

3rd. Did the Court err in the charge to the jury?

A chronological statement as to the whole controversy from the beginning, as shown by the record, will probably best conduce to a clear understanding of the question presented.

Over forty years ago the Central Ohio Railroad Company, an Ohio corporation, was organized, and built a railroad from Columbus, Ohio, to the Ohio river. For the purpose of obtaining right of way for its tracks, and necessary terminal facilities, said railroad company purchased a farm just north of the then village of Bellaire, which was situated on the bank of the Ohio river, and at the mouth of McMahon's creek. Said R. R. Co. appropriated to the use of its main and side tracks a strip of land just north of said village, and extending westwardly from the river, beyond said village, and to said creek bank. The part of said farm north of said strip of land

said railroad company caused to be laid out in lots and sold, and the main part of the City of Bellaire is now built thereon.

Record, pp. 12, 29 and 38.

The Central Ohio Railroad Company, as reorganized, is an Ohio corporation, and some time after 1866 succeeded to all the property and franchises of the Central Ohio Railroad Co.

Record, pp. 10 and 13.

In 1866 the property of the Central Ohio R. R Co., including all its property at Bellaire, was leased to the Baltimore & Ohio R. R. Co., a corporation of the State of Maryland, for the the term of 20 years, and renewable for like periods unless one or the other party gave notice within a year of the end of a term to abandon said lease.

No such notice was given at the end of the first term of twenty years, and said lease is now running upon its second period.

Record, pp. 10 and 12.

Up to 1871, passengers and freight were taken across the Ohio river by ferry, and the main track of the Central Ohio R. R. ran to the river over the aforementioned strip of ground. About 1871 a bridge was completed to be used by said railroads, which bridge is approached on the west by an arcade about one-half mile long, which passes to the north of said strip of land, and since the completion of said bridge the main track of said railroad has gone across the same.

Record, pp. 18 and 30.

About one-third of the population of the City of Bellaire live south of said strip of land and the tracks thereon; and between the parts of said city there is but one crossing over said strip of ground, which crossing is at Union street in said city. Belmont street in said city runs to each side of said strip of land, but has no crossing over the same.

Record, pp. 29, 30 and 47.

In 1877, the City of Bellaire was about to institute proceedings to open and extend Belmont street across said strip of ground and the tracks thereon; when the Baltimore & Ohio R. R. Co. applied to the Common Pleas Court of Belmont county for an injunction to prevent the opening of Belmont street at grade across said tracks and

strip of land, upon the ground that such extension would destroy the use of said tracks by the railroad company, and that the city was acting in bad faith in attempting to cross at grade.

Record, pp. 38 and 39.

The answer of the City of Bellaire put in issue the averments of the petition, and alleged specifically that the extension of said street at grade would not unnecessarily interfere with the reasonable use of said tracks, sidings or land by the railroad company. To this answer a reply was filed by said railroad company.

Record, pp. 35 to 37.

Upon the hearing in the Court of Common Pleas, the Baltimore & Ohio R. R. Co. was granted a perpetual injunction as prayed for in its petition.

Record, p. 35.

An appeal was taken by the City of Bellaire to the District Court. Trial was had in that court in the Spring of 1879, and the court found that the City of Bellaire was proceeding in good faith to make said crossing; but that it would be destructive of the use then made of said tracks by the railroad company, and that there was not at the commencement of the suit, or at the time of the hearing, such necessity for such extension as authorized the same. And the court decreed that the injunction heretofore allowed should be continued until the further order of the court.

Record, p. 41.

About the year 1884, district courts in Ohio were abolished, and circuit courts were established in their stead, and as their successors.

In the Spring of 1885, a motion was filed in the Circuit Court of Belmont County, asking a rehearing in the case decided by said District Court; and a rehearing was granted, and the case set down for hearing at the next term of said court.

Record, pp. 28 and 29.

In December, 1885, a rehearing, upon the same pleadings used in the District Court, was had, and an elaborate finding of facts was made by the Circuit Court.

Record, pp. 29 to 32.

The order of the District Court was modified, and it was ordered that the injunction should expire on the 20th day of January, 1886.

Record, pp. 31 and 32.

A petition in error was filed by the Baltimore & Ohio R. R. Co. in the Supreme Court of Ohio at once.

Record, p. 26.

That case was decided in March, 1887, by the Supreme Court of Ohio, and the judgment of the Circuit Court of Belmont County was affirmed.

Record, p. 42.

May 5th, 1887, the City of Bellaire filed in the Common Pleas Court of Belmont County its application to appropriate property for the extension at grade of Belmont street across the tracks or grounds heretofore described, and making the Baltimore & Ohio Railroad Company, a foreign corporation, and the Central Ohio Railroad Company, as reorganized, an Ohio corporation, defendants. But one parcel of land was described in the application, of which it was alleged the two railroad companies were owners, but the interest of each was not shown. The appropriation was desired only of such rights and interests in the property described as might be necessary to open and use said street.

Record, p. 2.

On the 17th of the same month the Baltimore & Ohio R. R. Co. filed in the Court of Common Pleas of Belmont County its petition and bond for the removal of this case to the U. S. Circuit Court upon the ground of a separable controversy between the B. & O. R. R. Co., a foreign corporation, and the City of Bellaire.

Record, p. 7.

The judge of the Court of Common Pleas declined to make any order as to the removal of the case.

June 3rd, 1887, an affidavit was filed for removal upon the ground of prejudice and local influence.

Record, p. 9.

A transcript of the record and proceedings in the in the Belmont Common Pleas was taken by the railroad company June 4th, but the certificate of the clerk shows that no order of removal had been made by the court.

Record, p. 9.

June 7th, 1887, a petition for the removal of the case was filed in the clerk's office of the U. S Circuit Court. This petition set up both a separable controversy, and prejudice and local influence.

Record, p. 11.

The Baltimore & Ohio R. R. Co. at the same time filed, in the U. S. Circuit Court, an answer to the application of the City of Bellaire to appropriate the crossing.

Record, pp. 12 to 14.

Soon after, the City of Bellaire filed in the U. S. Circuit Court its answer to the petition for removal, coupled with a motion to remand.

Record, pp. 14 and 15.

The motion to remand was argued before Judge Sage, but no evidence further than appears in this record, to-wit, in the foregoing pleadings and affidavits, was introduced either in support of or against said motion; and no effort was made to sustain the allegation of prejudice and local influence.

Judge Sage refused to remand upon the ground that the B. & O. R. R. Co. had a separable controversy with the City of Bellaire.

Record, pp. 15 and 16.

October 20th, 1887, the City of Bellaire filed a reply in the appropriation branch of the case, putting in issue divers matters alleged in the answer filed by the B. & O. R. R. Co., and especially alleging that in the case in the Circuit Court of Belmont County, heretofore referred to, it had been adjudged in substance that said railroad company did not have the right to the exclusive possession of the parcel of land described in the application as against the City of Bellaire desiring to open Belmont street.

Record, pp. 17 and 18.

At the trial of the case the court required the City of Bellaire to so amend its application as to allege specifically that the extension of Belmont street across the lands and tracks of said defendants would not unnecessarily interfere with the reasonable use of said land or tracks by said railroad companies. And with this issue is made in the name of both the B. & O. R. R. Co and the Central Ohio R. R. Co., which is the first and only time the Central Ohio R. R. Co. appears in this case as filing a pleading.

Record, pp. 19 and 20.

The issues are made up for trial substantially as follows:

The application, plat, and amendment describe the

property to be taken, aver the necessity for taking the same, that the necessary resolution and ordinance for such appropriation were duly passed, that the defendants are the owners of said property; and it is alleged that the City of Bellaire desires to appropriate and use said parcel of land only so far as may be necessary to open and use the street; and that such appropriation will not unnecessarily interfere with the reasonable use of the land or tracks of the defendants.

Record, pp. 2, 19 and 20, and between 8 and 9.

The answer of the B. & O. R. R. Co. alleges the purchase and ownership, by the Central Ohio R. R. Co., of the parcel of land described in the application, and that the B. & O. R. R. Co. is the lessee in possession thereof; that the tracks on said parcel of land are a part of an extensive system of railroads, and in constant use as a part of its terminal facilities, and have been so used since the Central Ohio Railroad was constructed; and that said land and tracks have already been purchased and appropriated to a public use by the said Central Ohio Railroad Company, and are now occupied for the same purpose by the B. & O. R. R. Co., and that the extension of Belmont street at grade will be inconsistent with and destructive of the present use made of said tracks—denies, for want of knowledge, the passage of an ordinance to appropriate said parcel of land, and denies the averments of the amendment to the application.

Record, pp. 12, 13, 14 and 20.

The reply denies that the tracks to be crossed are used to the extent claimed in the answer, and denies that the proposed use will be inconsistent with or destructive of the present uses to which the same is put by the B. & O. R. R. Co., sets up the fact that the main track does not now, as formerly, pass over this parcel of land; alleges that the main part of Bellaire was laid out by the Central Ohio R. R. Co. with streets as shown on the plat filed with the petition (or application); and pleads the judgment of the Circuit Court of Belmont County as to its right to make the proposed crossing.

Record, pp. 17 and 18.

At the first trial of the case, in January, 1888, the jury disagreed.

Record, p. 21.

In June, 1888, the case was tried again—and to the jury were submitted three questions. First, as to the right to take the land; second, as to the value of the land taken; third, as to damage to other property.

The jury found against the city upon the first question, but were, also, required to answer the other questions.

Record, pp 22, 44 and 49.

The value of the land taken was found to be $1,200.00, as to which no complaint is made. The damage was assessed at $40.000.00, which we think very excessive, and believe to have been occasioned by the testimony introduced by the defendants upon the first question submitted to the jury, and by the charge of the court.

Record, p. 22.

At the trial of the case the plaintiff in error contended that as against the B. & O. R. R. Co. its right to open the street across the tracks as proposed, had been settled by the litigation in the State courts; but it further claimed that the question of its right to cross was not a question for the jury, and that if it was proceeding in good faith to make the crossing, its necessity was to be presumed.

Record, pp. 25, 43 and 44.

The plaintiff in error excepted, also, to the charge of the court as to the rights of the railroad companies as owners of the land in fee, and not o a mere right of way, (Record, pp. 43, 45, 48 and 49); and to the rules and elements of damage as laid down by the Court.

Record, pp 43, 49 and 50.

A motion for a new trial was filed by the plaintiff in error, and overruled by Judge Sage.

Record, p. 23.

Judgment was entered upon the verdict, finding that the plaintiff was not entitled to appropriate the premises.

Record, pp. 23 and 24.

Two bills of exceptions were allowed, signed, sealed, and filed; the first containing the record of the proceedings in the State Courts, and its rejection as evidence; the second containing the charge of the Court, and the exceptions thereto.

Record, pp. 24, 25 and 43.

A writ of error was allowed to the Supreme Court.

Record, p. 24.

We shall attempt to discuss the alleged errors in the order in which they appear in the Record.

First. Was the B. & O. R. R. Co. entitled under the law to remove this case from the State Court to the U. S. Circuit Court?

Time will not be wasted in discussing the question of prejudice or local influence. The law of Ohio provides for the removal of a case to any adjoining county when such cause is shown, and three counties which adjoin Belmont, are not touched by the B. & O. Railroad, or any of its branches. But, in fact, no use was ever made of this allegation by the B. & O. R. R. Co. except to force a hearing in the U. S. Circuit Court; and the decision of Judge Sage upon the motion to remand is specifically based upon the ground of a separable controversy, and not upon the ground of prejudice or local influence.

Record, p. 15.

If there *was* such prejudice or local influence, on the hearing of the motion to remand, it was the duty of the B. & O. R. R. Co. to make some such showing by evidence outside of the affidavit filed.

Malone vs R. & O. Ry. Co., 35th Fed. Rep., p. 625.

This brings us, then, directly to the question as to whether the Court erred in its finding as shown at page 15 of the Record, and which is as follows:

"The B. & O. R. R. Co. has in this case a separate controversy, which is wholly between it and the city of Bellaire and which can be fully determined as between them. This is the question of the value of the leasehold interest of the B. & O. R. R. Co. in the land which the city seeks to appropriate. This interest is wholly apart from the interest of the Central Ohio R. R. Co. in the fee, and entitled the B. & O. Co. to a separate verdict."

The Central Ohio R. R. Co. as reorganized was the owner in fee of the land sought to be appropriated; and the B. & O. R. R. Co. was the lessee of all the property of the former company, including this parcel of land.

Record, pp. 12 and 13.

Does that give the B. & O. R. R. Co. a separate controversy with the city of Bellaire, desiring to appropriate for street purposes, and so far as might be necessary for such purposes, the interest of both railroad companies in said land?

Record, p. 2.

It has been apparently conceded in this case that the Central Ohio R. R. Co. was a necessary party. And it would seem useless to contend that the city of Bellaire could lawfully condemn this parcel of land for street purposes, without making the owner of the fee a party to the proceeding. The Central Ohio R. R. Co. as reorganized, is not, then, a merely nominal, though necessary party; but a party having a real interest in the controversy. The lease of the B. & O. R. R. Co. is for less than twenty years at the option of the lessor; and it can not be said that the *main* controversy is between the B. & O. R. R. Co. and the City of Bellaire.

Record, pp. 10 and 12.

If it was practicable, it would certainly not be advisable, that there should be two law suits in the appropriation of this land; one by the City of Bellaire against the lessee, and one by the same party against the lessor. But, even if this were practicable and proper, we do not understand that on a question of the right of removal a defendant can dictate as to the manner of bringing suit; so, only, that the plaintiff's way is a legitimate way.

Plymouth Mining Co *vs* Amador Canal Co, 118 U. S. 264.

Little *vs* Giles, 118 U. S. 596.

Has the City of Bellaire, then, the legal right to have but one trial in the appropriation of this parcel of land? Any possible claim as to the right of separate trials in this case must be based upon the language of Section 2245 of the Revised Statutes of Ohio. But this section must be construed as a whole, and, also, in its connection with the other sections of the chapter in which it is found; and especial attention is called to sections 2236, 2247 and 2250; and all taken together seem clearly to require only that each parcel shall be considered by the jury separately. And while in the early part of Section 2245 the direction is that the assessment shall be so made that the amount payable to each owner may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land; yet, it is further provided in the same section that not more than two counsel shall be heard for the city, or the owners of any separate lot or tract. If, in this case, the defendants were entitled to separate trials, but one counsel could have been heard for each defendant, except by permission of the Court for good cause shown.

And in many a case that has been tried the two counsel would be far from going around. There are, of course, many cases in which the owner and lessor of a parcel of property has a large number of lessees of the different parts of the parcel of land; and in appropriation proceedings to take such parcel of land for opening or widening a street, each lessee would have all the rights that the B. & O. R. R. Co. now has, as to a separate trial. But further, the statute makes no specific mention of lessees, or of the interests of lessees, but of owners; and if it is to be taken literally, and each owner has a right to a separate trial and finding, then if the owner of a business block in Bellaire should die intestate leaving a widow and ten children, and the different parts of the property should be under lease to these different tenants, fourteen (14) law suits would be necessary at the option of the defendants, before the City of Bellaire could appropriate such property for street purposes. Common sense seems to be against such an interpretation.

It has already been decided by this court that under statutes substantially the same, each owner of an interest in a parcel of land is not entitled to a separate trial in condemnation proceedings in Ohio.

Kohl *vs* United States, 91 U. S. 367.

If each owner does not have a right to a separate trial, and a separate finding, he certainly does not have a separate controversy, in any true sense of the word.

We contend that the only proper controversies in this case were as to the right of the city to appropriate land in use for railroad tracks, and the amount of compensation and damages to be paid by the city, if it took the parcel of land described in the application. And these issues were just as much, and as fully, with one defendant as with the other.

Our understanding is that in order to justify the removal of a case by one of two defendants on the ground of separable controversy, the suit must be capable of being finally determined without the presence of the other defendant

Torrence *vs* Shedd, decided April, 1892.
Vol 12, Supreme Court Reporter, p. 726.

If the above were the proper issues in this case, the suit certainly could not have been finally settled without

the presence of the Central Ohio Railroad Company, as reorganized, an Ohio corporation.

The provisions of Section 2 of the act of 1875, as to separable controversy, were indentical in all matters material to this case with the act of 1887; and under that act Judge Dillon states the law as follows:

'A removal under the act of 1875 is only allowable when the whole suit can be removed, and when the real controversy is so completely between citizens o different states, as opposing parties, that, when the questions upon which they are opposed are decided, the whole of the controversy between the real adversary parties will be thereby determined."

Dillon's Removal of Causes, Sec. 25, p. 31.

The case of Brooks *vs* Clark with mony others, from the "Removal Cases" down, seem to fully establish the doctrine that under the act of 1875, all the *necessary* and *proper* defendants must be non-residents of the state where the suit is brought, to give the defendants, or any of them, a right to remove the case to the United States Court, even upon the ground of a separable controversy.

100 U. S. 457. 119 U. S. 502.

If the object of this suit is single—that is to appropriate for street purposes one single parcel of land, and the Central Ohio R. R. Co. is a necessary party in the accomplishment of that object, it is impossible that there should be good ground under the law for the removal of the case.

This court has for many years been making decisions as to what are, and what are not, under the statute, separable controversies; and among them all we can find no authority for calling the matter to be litigated in this case a controversy wholly between the City of Bellaire and the B. & O. R. R. Co.

The case of Fidelity Ins. Co. against Huntington is worthy of attention, not only for the point decided as to what was the actual controversy in that case, but, also, for the reasoning of the court thereon. Paraphrasing from that case (p. 282), with a change of names—"what the City of Bellaire wants is not partial relief settling what is to be paid for the rights of the B. & O. R. R. Co. in the land described in the application, but a complete finding which will give it the right to use the land as a street.

117 U. S. 280.

As to when a resident defendant will be held to be a necessary party, we refer to Rand *vs* Walker, 117 U. S. 340.

The Union Pacific Railway case, 115 U. S. p. 2, is an authority for suits of this nature being removable upon proper grounds; but it is not an authority as to the separable controversy branch of this case. As to the facts in that case, see pages 5, 6 and 19 to 23, of the above report. The Union Pacific Railway Company was the sole owner of the particular parcel of land with reference to the appropriation of which said Railway Company was defendant.

Our case would have been analogous to that, had the application of the City of Bellaire been to appropriate for opening its street two parcels of land, one owned by Central Ohio R. R. Co. and the other by the B. & O. R. R. Co.

That parties have separate defenses, or that one answers, and the other does not, cannot divide the suit into separate cnotrouversies.

Railroad Co. *vs.* Ide, 114 U. S. 52.
Starin *vs.* New York, 115 U. S. 248.
Brooke *vs.* Clark, 119 U. S. 502

For statements or definitions of "separable controversy" we refer to—

Graves *vs* Corbin, 132 U. S. 571.
Ayers *vs.* Wiswell, 112 U. S. 192-3.
Fraser *vs.* Jennison, 106 U. S. 194.
Hyde *vs.* Ruble, 104 U. S. 409.
Barney *vs.* Latham, 103 U. S. 205.

In the opinion rendered in the court below on the motion to remand, three cases are cited.

Record, p. 15.

These cases support the second finding, and may have been cited for that purpose only. But if they are cited to support the finding now under discussion, we respectfully submit that they are not in point.

In the case of Barney *vs.* Latham there is some discussion as to the distinction between *proper* parties and *indispensable* parties, but there is nothing to indicate that in such a case as the one at bar, either of the defendants would not be an indispensable party; and the facts in that case show that there were practically two suits in

one. This is, also, shown by the following extract from the opinion of this court in the case of Hyde *vs* Ruble.

In the case of Barney *vs.* Latham, "Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in each suit as to the particular controversy involved."

104 U. S. 409.

The opinion quoted in this case says the separable controversy was as to the value of the leasehold interest of the B. & O. R. R. Co. in the land to be appropriated. If that is so, it is a small controversy, as the whole value of the land appropriated was found by the jury to be only $1,200.00. But that was not *the* question, or *a* question, made by the plaintiff in its application to appropriate; and when the pleadings for the trial of this case were all made up, no such issue appeared therein. We have in a former part of this brief discussed to some extent the result, if such issues were required to be made up and tried in cases like this.

The whole tone and tenor of the case of Brooks *vs.* Clark seems to us against the holding that there is a separable controversy in this case.

We respectfully submit that the motion to remand ought to have been sustained by the Circuit Court.

We now come to the questions connected with the submission to the jury of the *right* of the City of Bellaire to extend its street across the tracks of the defendants; and the rejection, as evidence, of the record in the former case.

The question as to the right of the city to so extend its street was submitted to the jury over the objection of the City of Bellaire.

Record, p. 43.

The submission was based upon Section 2233 of the Revised Statutes of Ohio, which reads as follows:

"The power to appropriate may, also, be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, where such appropriation will not un-

necessarily interfere with the reasonable use of such road or land by the railway company."

Said city always claimed that, if it was proceeding, in good faith, to extend Belmont street across the tracks of the defendant companies, such proceeding alone made a case as to the *necessity* for such crossing.

R. R. Co. *vs* Ironton, 19 O. S. 299.

Ry. Co *vs* Dayton, 23 O. S. 510 and 519.

Talbot *vs* Hudson, 16 Gray 417.

Dillon on Municipal Corp., Sec's 465 and 466.

But it was further claimed that this question was in its nature a preliminary one, and not to be submitted to a jury—but was to be decided by the court as other preliminary questions are. If the honest determination of the City Council is to count for nothing, it certainly ought to require something of an expert to pass upon such a question.

It is possibly not entirely clear just what Section 2233 means. But it was evidently passed to enlarge the authority which cities already had to extend their streets across tracks and yards; and not for the purpose of limiting such right.

Ry. Co. *vs* Dayton, 23 O. S. 510.

If, however, such question was a proper one for the jury, the City of Bellaire claimed it had already litigated the same question with the B. & O. R. R. Co. and that it should not be required to litigate it again. In proof of this it offered in evidence the record of the litigation in the District and Circuit Courts of Belmont county heretofore referred to.

Record, p. 25.

It is true that the Central Ohio R. R. Co., as reorganized, was not a party to that suit. But the record was not excluded upon that ground; nor would it well be, if this suit is substantially with the B. & O. R. R. Co alone, as it must be to sustain the removal of the case upon the ground of separable controversy. Nor was it excluded upon the ground that the same matter was not in controversy. It was rejected upon the theory that as the Supreme Court of Ohio did not give the grounds upon which it affirmed the decision of the Belmont Circuit Court, that such affirmance may have been upon the ground

that the Circuit Court of Belmont county had no jurisdiction in the case We confess that we do not know how to argue against such a conclusion. The record offered in evidence nowhere shows any such question made or relied upon. If the case had stopped with the decision of the Circuit Court of Belmont county, we understood the court below to make no question that such decision would have been binding on the B. & O. R. R. Co. and how the filing of a petition in error in the Supreme Court of Ohio, and the affirmance of the decision, could make it less binding we have never been able to understand.

We suppose, however, that the question of error in the rejection of such record as evidence, does not depend upon the reasons given therefor; and which reasons are, in fact, no part of the record in this case.

In the case of the B. & O. R. R. Co. *vs* The City of Bellaire, in the District and Circuit Courts of Belmont county, the question and issue was as to the right of the City of Bellaire to extend Belmont street, just as it was proposed to do in the pending suit.

Record, pp. 28, 29 and 36 to 39, and plat at p. 8.

The question litigated from November 1877 to March 1887 was the one question as to the right of said city to open and extend Belmont street.

Record, pp. 34 and 42.

Up to December, 1885, the holdings had been adverse to the City of Bellaire; but the Circuit Court then found substantially in favor of said city.

Record, pp. 28, 35 and 29 to 32.

A petition in error was filed in the Supreme Court of Ohio, asking that such finding of the Circuit Court might be reversed.

Record, p. 26.

Said Supreme Court affirmed the decision of the Circuit Court.

Record, p. 42.

In the case now at bar, one of the issues made by the pleadings, and expressly submitted by the court, was as

to the right of said city to appropriate said parcel of land for the extension of Belmont street.

Record, pp. 20, 22 and 44.

We claim, of course, that the record offered in evidence should have been conclusive upon all questions litigated in that case; but the question here is not as to the effect of the record; but as to its admissibility. If it was competent evidence tending to prove any issue made in the pleadings, it was admissible. The record offered certainly tended to sustain one of the issues made by the reply; and we think it was competent evidence upon the issue made by the amendment to the application and the answer thereto.

Record, pp. 18, 19 and 20.

It seems hardly necessary to quote authorities as to the effect of judgments or decrees.

Any matter at issue in the former case, and litigated to a conclusion, cannot in this case be re litigated between the same parties.

Bryan *vs.* Kennett, 113 U. S. 180 and 198.

Babcock & Co. *vs.* Camp, 41 O. S. 141.

And this includes every question covered by the issues made, whether actively litigated or not.

Petersine *vs.* Thomas, 28 O. S. 596.

Martin *vs.* Roney, 41 O. S. 141.

The fact that there were additional issues in this case, did not give any right to re-litigate any issue formerly decided.

Wilson's Executor *vs.* Deen, 121 U. S. 525 and 532.

The decree made in the State Court was not in an ordinary form; but it was a final decree, and certainly would have been a complete bar to a new suit by the B. & O. R. R. Co. to enjoin the City of Bellaire from extending Belmont street at grade across its tracks.

Record, pp. 31 and 41.

The object of that suit was to enjoin the City of Bellaire from extending Belmont street. The effect of the question submitted to the jury was to prevent the same extension.

Record, pp. 22 and 24.

It is to be remembered, too, that Section 2283 of the Revised Statutes of Ohio, was passed in 1873; so that the statute law of Ohio was the same during all the litigation about this street extension.

We respectfully submit that the question of the right of the City of Bellaire to extend Belmont street ought not to have been submitted to the jury; and that there was error in excluding, as evidence, the record of the case of the B. & O. R. R. Co. *vs.* Bellaire.

We shall consider next the question of error in the charge of the court.

The plaintiff in error excepted to the charge of the court upon four different points—

1. As to the rights of the railroad companies growing out of their ownership of the land in fee.

2. To the elements of damage as laid down by the court.

3. To the instructions as to damages to the whole yard.

4. To the portion of the charge submitting to the jury the question as to the plaintiff's proposed extension unnecessarily interfering with the reasonable use of the defendant's property.

Record, p. 43.

We shall not attempt to take up these points in the exact order of the exceptions; but we shall take them rather in the order they appear in the charge. In passing we desire to call the attention of the court to the tone of the whole charge, though no formal exception is taken to the charge as a whole. It is quite evident, we think, that the Judge trying the case was not in favor of grade crossings over railroad tracks; and that all favorable assumptions are made on the side of the defendants.

We think the court so submitted to the jury the question as to the proposed crossing unnecessarily interfering with the reasonable use of the land by the defendants, that the jury, if they followed the charge, must have answered the first question in favor of the railroad companies. And the same rules applied would prevent any possible extension at grade of a street over railroad tracks in actual use.

The question is stated, at page 44 of the Record, and the rules are there laid down as follows:

"If the appropriation can be made without an unnecessary interference with the reasonable use of the lands owned by the railroad company it may be made. If it does lead to an unnecessary interference with the reasonable use the law does not authorize the appropriation."

In the reply of the plaintiff it is admitted that after the street is extended the railroad companies can not use the parcel of ground for all the purposes they are then using it for, (Rec. p. 18), and it had, of course, been conceded all through the trial of the case that there would be interference with the use of the land by the railroad companies. (Rec. p. 49). Yet the court charges the jury as follows:

"As I explained this morning, the property in question in this case is not a part of the right of way of the Baltimore and Ohio Railroad Company. It is not a part of the highway of that road. It is property owned in fee by the defendant companies, acquired by purchase according to law, for the law permits the acquisition of property by railroad companies for all purposes necessary for the conduct of its business.

'Owning this land in fee, it has for many years been devoted to the uses of the company for what has been denominated by the witnesses a yard—that is to say, place for locating its cars, for breaking up and reconstructing its trains, for shifting cars, and those purposes incidental to the use of its track upon its line of way and necessary to enable the company to conduct its freight business."

Record, p. 45

Further on, after discussing to some extent the feasibility of making the crossing by bridge or tunnel, and the costs and expenses thereof, the court charges the jury as follows:

"The railroad company has the same right to the use of this yard that any individual owner of land has to the use of his premises, and when it is said that the railroad company could devise other means for accommodating its business, that furnishes no answer, because the railroad company has the right to use its own property in its own way, and it is not for court or jury or the City of Bellaire or anybody else to dictate to the railroad company how it shall use its own property.

"You will have to consider, gentlemen, and I have already referred to that, how the business of the railroad company would be interfered with; the interruption of its trains; necessity for keeping the street open—for the proposition here is to open a highway across a private way, and remember that the city has no right, as I have already indicated, to put a stop to the use of that yard as it has been used or in any way that the company may desire to use it for railroad purposes.

"But if you find that the crossing at grade is necessary, that it does not involve an unnecessary interference with the the reasonable use of the property, it will be your duty to answer the first question accordingly.

"If you find that it will involve such unnecessary interference, then you must so say in answer to the first question."

Record, pp. 48 and 49.

Under these instructions the finding would necessarily be that the use thentofore made by the defendants of the parcel of land which it was proposed to appropriate, was, in all respects, a reasonable use; and that any interference with such use that could be avoided, at whatever cost, was an unnecessary interference.

As to the effect upon these proceedings of the ownership of the land *in fee* by the defendants, a part of the quotations just made from the charge of the court are applicable; but we shall need to requote to get the full connection.

"Now it has been held that the right of way which the law permits a railroad company to acquire by the exercise of what is called the right of eminent domain, which is the right to appropriate property without the consent of the owner, paying him compensation therefor, does not give to a railroad company the sole and exclusive use of that right of way, but that it is subordinate to the right of the public and the right of other railway companies to cross by highways or tracks that line of road. I explained in passing upon that point this morning in your hearing the reasons for that rule, and I need not advert to them again.

"In such case it has, also, been held that the compensation to be assessed is limited to the value of the property to the extent to which it is appropriated and does not include the expense to the railroad over whose line the crossing is demanded, of constructing cattle guards, or the interruption of its trains or the expense of watchmen, if it fiinds it necessary to place them there. But, as I explained this morning, the property in question in this case is not a part of the right of way of the Baltimore and Ohio Railroad Company. It is not a part of the highway of that road. It is property owned in fee by the defendant companies, acquired by purchase according to law, for the law permits the aquisition of property by railroad companies for all purposes necessary for the conduct of its business.

"Owning this land in fee, it has for many years been devoted to the uses of the company for what has been denominated by the witnesses a yard –that is to say, place for locating its cars, for breaking up and reconstructing its trains, for shifting cars, and those purposes incidental to the use of its track upon its line of way and necessary to enable the company to conduct its freight business."

Record, p 45.

"You will have to consider, gentlemen, and I have already referred to that, how the business of the railroad company would be interfered with; the interruption of its trains; necessity for keeping the street open—for the proposition here is to open a highway across a private way, and remember that the city has no right, as I have already indicated, to put a stop to the use of that yard as it has been used, or in any way that the company may desire to use it for railroad purposes.

"There is, therefore, a proposition here to establish a highway across a private way, one running at right angles to the other, and, from the very nature of the case, the use of the highway must be, whenever it is in use, exclusive of the use of the private way or of the yard at that point. On the other hand, the use of the yard at that place must be exclusive for the time being of the use of the public. . Manifestly, carriages and foot passengers cannot pass at that point while the trains of the company are passing, nor can trains of the company pass while the public is using the street."

Record, p. 49.

Outside of the opinion of the court below, we can find no authority for the proposition that it makes a difference in the rights af a railroad company as to the extension of a street across its tracks or lands, whether it owns the land in fee, or has appropriated it under the statute. In either case it has the right to hold land only for railroad purposes; and lands may be appropriated in Ohio for yards, depots, etc, as well as for right of way.

R. R. Co. *vs.* Ironton, 19 O. S. 299 and 305.

If there is such difference as to lands operated for a yard, there must be the same difference as to lands used for right of way. Who ever heard that as between the railroad company and the public, the rights of the latter were dependent upon the manner in which the railroad company had acquired title to the possession of its right of way?

This matter can not be considered as immaterial, for it bears directly upon the question of the right of the city to cross, as well as upon the question of damages.

Lastly, we come to that part of the charge which states the elements of damage, including therein what is said as to damage to the whole yard. The court charged the jury as follows:

"Now we come to the third question: 'What is the extent in value of the impairment of the defendant's yard for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it.'

"That requires you, gentlemen, to consider and answer how much the value of the entire yard, not merely the portion contiguous to this street, but through its whole extent, is impaired, or would be impaired for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it.

"You will have to consider, gentlemen, and I have already referred to that, how the business of the railroad company would be interfered with; the interruption of its trains; necessity for keeping the street open—for the

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Record, p. 49.

"To what extent this impairment will extend, and it is conceded by all the witnesses that an impairment will necessarily result—to what extent is not and cannot be, from the very nature of the case, precisely stated by any witness. You have a right to look at the circumstances."

Record, pp. 49 and 50.

"As I stated this morning, in passing upon the questions of law which were argued after the jury left the room yesterday evening, the railroad company cannot recover anything for planking the street crossing, if it be opened. That is a duty imposed by the legislature. It can recover nothing for the expense of cattle guards. That is also a duty imposed by the statute. It can recover nothing for the expense of watchmen, for if it places them there it does so for its own protection, and it is not required to do so; nor can it recover specifically for the extra expense entailed in other respects by the opening of the street—that is to say, gentlemen, there was testimony that an additional locomotive and crew would be required; that delay by breaking the trains involved an expense, and an estimate of witnesses how much that would amount to in the course of a day. Now, no estimate of that sort can be allowed as a damage, but it can be taken into account in arriving at the impairment of the value. The difference may be almost metaphysical, but nevertheless it is one established by the law. They do not recover what it costs them extra to run their trains, but they do recover—they are entitled to recover what the diminution in the value is resulting from the interference with their use and from the extra expense to which they would be put."

Record, p. 50.

The Constitution of Ohio provides that no person's property shall be taken for public use without full compensation, and that compensation involves not only payment for the land actually taken, but whatever injury is

done to the remaining premises, and that is to be taken into account in the answer to the third question.

Record, p. 51.

On exception being taken to applying the question of damagee to the whole yard, the court further says:

"Gentlemen, I apply it to the whole yard just so far, and only so far, as the value of the whole yard may in your opinion be impaired by this crossing; and if it be impaired, then the company must be paid for it."

Record, p. 52,

Some idea as to the size and shape of the yard may be gotten from the findings at pages 29, 30, 31, 45 and 46, of the Record. The description, and the value given, shows that the part of the yard interfered with directly, was but a very small part of the whole.

Record, pp. 2 and 22.

It is, also, shown that the part of Bellaire immediately north of the proposed crossing was platted and laid out by the defendants; and that consequently Belmont street was laid out as a street by the defendants down to the proposed crossing.

Record, pp. 29 and 47.

The plat at page 8 shows the street just south of the proposed crossing, as laid out in the old town of Bellaire.

In that state of facts, were the defendants entitled to receive all they could show the whole yard to be depreciated in value, if the crossing was made?

If the defendants, in this matter, stand in exactly the same relation to the public, that a farmer would hold to a railroad company extending its road through his farm, then that is possibly so. But we think the railroads do not stand in that relation to the public, as represented by the City of Bellaire. They take from the state such rights only as she gives them; and these rights are expressly subject to change when required by the public good.

We think, further, that a railroad yard with its diverse uses and accompaniments, and dependent for its future value. not only upon the busiuess done by its owners, but upon the manner in which such business is done in the future, is not such property, as, upon princi-

ple, should be considered as a whole in assessing damages for a crossing over a part of the yard. It would seem, too, that when a railroad company lays out a town adjacent to its yard, with streets abutting thereon, which, if extended, must cross the yard, that, impliedly, the public have a right to expect such street to be extended when needed, without paying for all damage to improvements made by such railroad company after the town was laid out.

The statutes providing specially for appropriating land for opening and extending streets make no provision whatever as to the manner of assessing damages.

Record, Statutes of Ohio, Sec's 2232 to 2246

The rules given the jury for estimating damages are taken from Section 6427 of our Statutes, and the decisions with reference thereto.

The charge of the court at page 50 authorizes the jury to take into account evidence that was inadmissible upon the question of damages, but which was gotten in upon the issue as to the unnecessary interference with the reasonable use of the land by the Railroad Company, and we have found no authority which justifies the use there made of the evidence, or the distinction drawn as to the legitimate use of said evidence.

There must in this case be a great deal in a name, if the railroad companies may recover the cost of furnishing and running an additional engine, and the expense of delay to trains, by calling such costs and expenses, "impairment of value"; though no estimate of that cost could be allowed as damage.

We claim that, if damages were allowed, they should have been confined to injuries in the immediate vicinity of the land taken; and that none of the inconveniences necessarily incident to such a crossing at grade, ought to have been taken into account; and in support of this we cite the following authorities, asking special attention to the Ohio cases.

Railway Co. *vs* Railway Co. 30 O. S. 604 and 618.
Railway Co. *vs* Sharpe, 38 O. S. 150.
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Railroad Co. *vs* Railroad Co., 121 Mass. 124 and 126.
Pierce on Railroads, p. 218.

We submit that the charge of the court below was not

fair to the plaintiff in error; and that there was error therein in the matters excepted to, and complained of.

We ask that the judgment of the Circuit Court be reversed, for error in overruling the motion to remand the case to the State Court, for error in excluding testimony, and for error in the charge to the jury.

J. A. GALLAHER.

Attorney for Plaintiff in Error.

146 U.S. 117

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

RECORD, CASE No. 13,552.

TERM No. 38. OCTOBER TERM, 1892

CITY OF BELLAIRE, Plaintiff in Error

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, AND THE CENTRAL OHIO RAILROAD COMPANY, AS RE-ORGANIZED.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN K. COWEN,
JOHN H. COLLINS,
HUGH L. BOND, JR.,
Counsel for Defendants in Error.

KING BROTHERS, PRINTERS, BALTIMORE.

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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This is a proceeding in the form of an action at law by the plaintiff in error, to appropriate for the purposes of a street part of the railroad yard in the city of Bellaire, owned in fee by the Central Ohio Railroad Company, and leased to the Baltimore and Ohio Railroad Company.

The proceeding was begun May 5, 1887, in the Court of Common Pleas of Belmont county, Ohio, by the plaintiff

in error filing therein its "application to appropriate property and assess compensation." (Record, page 2.)

The same day notice was issued of application to be made to the Court, May 18th, and served May 14th, on the agent of the Baltimore and Ohio Ralroad Company, and May 13th, on the president of the Central Ohio Railroad Company. (Record, pages 5 and 6.)

On May 17th the Baltimore and Ohio Railroad Company filed in the State Court its petition, affidavit and bond for removal to the Circuit Court of the United States. (Record, page 6.) On June 7th the transcript of the Record from the State Court was filed in the Federal Court. (Record, page 1.) On the same day the Baltimore and Ohio Railroad Company filed in the United States Circuit Court for the Southern District of Ohio, its petition and affidavit for the removal of the case from the State Court, on the ground of prejudice and local influence. (Record, page 12.) By previous order of the State Court the case had been set for trial June 9th. (Record, pages 9 and 11.) On June 11th the City of Bellaire filed, in the Federal Court, its answer to the petition for removal and a motion to remand, which motion was overruled by the Court July 5th. (Record, pages 14 and 15.) This action of the Court in refusing to remand the case is the first error assigned here.

At the trial the plaintiff excepted to the refusal of the Court to admit in evidence the Record in the Supreme Court of Ohio of a certain suit between the Baltimore and Ohio Railroad Company, plaintiff below and in error, and the City of Bellaire. This Record is embodied in the first bill of exceptions, found in the present Record at pages 25 to 42, inclusive.

The other exceptions are to the instructions of the Court, and are all embodied in the second bill of exceptions, pages 43 to 54 of the Record.

By agreement of counsel, at the trial, separate verdicts were waived and the land treated as the property of the

Baltimore and Ohio Railroad Company. (Record, page 44.)

The Court submitted to the jury the issues raised by the pleadings in the form of three questions, and instructed them to find a special verdict answering each of the questions; this verdict is found on page 22 of the Record.

The questions and answers are as follows:

"1st. Would the appropriation of the premises in question unnecessarily interfere with the reasonable use of the land and road by the defendant companies or either of them?

"Answer. It would.

"2d. What is the value of the interest in the land proposed to be apppropriated which must be divested from the defendants in order to its use for a street?

"Answer. $1,200.

"3rd. What is the extent in value of the impairment of the defendants' yard for the purposes for which it is used by the appropriation of the land in question and the extension of the street across it?

"Answer. $40,000."

On this verdict the Court entered its judgment, (Record, page 24,) as follows:

"That the appropriation of the premises in question would unnecessarily interfere with the reasonable use of the land and road by the defendant companies, to wit, in the land and road in the pleadings described; that therefore the plaintiff is not entitled to appropriate said premises to its use; that the defendants recover of the plaintiff their costs, etc."

To reverse this judgment the present writ of error is taken.

ARGUMENT.

First—The Refusal to Remand.

No question is made that the petitions for removal, both that filed in the State Court and that filed in the United States Court, were sufficient in form and filed in due time. The ground taken by the counsel for plaintiff in error is that the presence, as a defendant, of the Central Ohio Railroad Company, an Ohio corporation, prevented the removal of the case. The petition filed in the State Court alleges that the controversy between the City of Bellaire and the Baltimore and Ohio Railroad Company is a separate one, capable of being fully determined as between them. The petition filed in the United States Court also sets out fully the character of the controversy.

The removal on the petition filed in the State Court is assailed on the ground that there was not in fact a separable controversy between the city of Bellaire and the Baltimore and Ohio Railroad Company. The city of Bellaire wishes to use a certain strip of land for a street. The Constitution of Ohio provides that no person's property shall be taken for public use without full compensation. In order to use this strip of land as a street the city of Bellarie must first make compensation for the property taken. In this case there are two properties, to wit, the fee simple interest of the Central Ohio Railroad Company, which is its property, and the leasehold interest of the Baltimore and Ohio Railroad Co., which is its property. There may be a separate proceeding to ascertain the value of the property of the Baltimore and Ohio Railroad Company, or the value of its property and the value of the Central Ohio Railroad Company's property may be ascertained in the same proceeding, but in the latter case the statute authorizing the proceeding specifically provides that the values of the two property interests shall be separately ascertained and awarded to each owner.

Therefore, in such a proceeding as this a controversy must arise between the city of Bellaire and each of the

owners of property rights in the land sought to be used, and each such controversy is necesssarily a distinct and separate one, in no way dependent for its full determination upon any other controversy.

Barney vs. Latham, 103 U. S. 205, 212, 214.
Union Pac. Rwy. Co. vs. City of Kansas, 115 U. S. 2, 22.

The counsel for plaintiff in error contends that "if each owner does not have a right to a separate trial and a separate finding, he certainly does not have a separate controversy in any true sense of the word." If his statement of the law were correct, the provision in the removal statute, as to separable controversies, would be meaningless; if the parties defendant could not be made parties in the same proceeding, that would end the matter. The provision of the removal statute looks not to the form of the proceeding, but to its substance. It is intended to meet just such a case as the present one, wherein the plaintiff is permitted, for the purposes of convenience, to make more than one defendant in the same proceeding; and is intended, while permitting such form of proceeding, yet to secure to the citizen of another State the right to have his controversy tried by the Federal Court. The fact that the controversy between the city of Bellaire and the Baltimore and Ohio Railroad Company could be fully determined in a separate case, shows, conclusively, the separable character of the controversy. It is not necessary that it must be so determined. The plaintiff can not, by choosing a form more convenient to it, deprive the non-resident defendant of his right of trial in the Federal Court.

The answer to the petition for removal and motion to remand denies, (1.) That the matter in dispute exceeds the sum of $2,000. (2.) That there is a controversy in this suit which is wholly between the plaintiff and the Baltimore and Ohio Railroad. (3.) That from

prejudice and local influence it will be impossible for the Baltimore and Ohio Railroad Company to obtain justice in the Court of Common Pleas of Belmont county, Ohio, etc.

The issues raised by these denials were decided by the Court in favor of the removal. The journal entry is found on page 16 of the Record, as follows:

"This cause came on to be heard at this term upon the motion of the plaintiff to remand the same to the Court of Common Pleas of Belmont county, and was argued by counsel, and thereupon, upon consideration thereof, the Court doth overrule said motion."

There is nothing in the Record to show upon what testimony the issues of fact were tried and determined. The memorandum of opinion of the court, copied into the Record, page 15, can not be relied on to complete the Record in this particular. Clearly the Court must have found against the plaintiff on the issue of fact as to the amount in controversy although nothing is said about it in the memorandum of opinion.

There is nothing in the Record to negative the presumption that the Court also found against the plaintiff on the question of prejudice and local influence. The memorandum of opinion deals simply with the question of law. There is no exception noted to the action of the Court in overruling the motion to remand. The affidavit as to the existence of prejudice and local influence was legally sufficient to support the action of the Court, though not binding upon it.

In re Pennsylvania Co., 137 U. S. 451, 457.

The transcript of the Record being already in the Federal Court, and the plaintiff appearing there to litigate the question of removal, no formal order of removal was necessary. The refusal to remand was a sufficient assumption of jurisdiction.

We submit that there is nothing in this Record upon which the plaintiff in error can raise any question as to

the sufficiency of the evidence on the issues of fact before the Court, to sustain its action in overruling the motion to remand.

SECOND—EXCEPTION TO THE EXCLUSION OF TESTIMONY.

The testimony in question is a record in the Supreme Court of Ohio. It seems that on November 30, 1877, the Baltimore and Ohio Railroad Company filed its petition (Record, page 38) in the Court of Common Pleas of Belmont County, asking for an injunction to restrain the City of Bellaire from taking any proceedings to extend Belmont street across the railroad company's yard. The petition sets out the ownership and lease of the land, and the use made of it, an alleged understanding with the city of Bellaire and its citizens that the exclusive use, for the purposes of a railroad yard, should not be disturbed, and that the proposed action of the city would result "in the destruction and subversion of the use of said tracks by the plaintiff for the purposes for which said tracks were originally laid and now used, and destroy the use for which said lands were purchased and for which the plaintiff leased them; that in attempting to cross said tracks on grade, the said defendant is acting in bad faith not only to said plaintiff, but to its own citizens, by making a crossing which will destroy the use by the plaintiff of said property, and greatly endanger the lives of its citizens in making a crossing which will always be dangerous."

The answer of the city (Record, page 36) denies all the allegations of the petition except the allegation of title, and further sets out that "the defendant is a city of the second class, and its council has, by proper resolution, passed in good faith, in the form and manner prescribed by law, declared its intention to extend Belmont street across the land described in the petition, so as to connect the two parts of the territory of said city; said extension is a public necessity, and defendant, as it is advised, has

a lawful authority to make it upon making payment of compensation to the owners of the property to be used or appropriated, and payment of the damages which may be sustained by such owners."

The reply of the Baltimore and Ohio Railroad Company (Record, page 35) says: "that it is not true that the defendant has by proper resolution and in good faith in form and manner prescribed by law, declared its intention to extend Belmont street across plaintiff's land. Plaintiff denies that defendant has proceeded according to the mode provided by law. Said extension is not a public necessity, and it can not be made without destroying the use for which said land is now used by the plaintiff; the defendant, therefore, has no authority to make the extension, and plaintiff says that if said tracks are used by the plaintiff for the purposes now used, a street crossing the same at the junction of Belmont street, will result in continued and great danger to the lives of the citizens of said city, and can never be a safe crossing, and will not be used as such by the citizens generally. Either it can not be used as a street crossing or it can not be used for the purposes for which said tracks are now used. It can not be used for both."

An injunction was obtained in the Court of Common Pleas, and on appeal, the District Court, April 10th, 1879, entered its finding and order continuing the injunction until the further order of the Court. (Record, page 28.)

In June, 1885, the city obtained a re-hearing from the Circuit Court, which had, in the meantime, succeeded the District Court. On that re-hearing the Court made the finding of facts and order found in the present Record, at pages 29 to 32. The Court state their conclusions of law as follows:

"As the conclusion of law, the Court find that the defendant is entitled to have the order of the District Court, granting said injunction, modified. It is, therefore, considered and adjudged by the Court that the said

injunction so made and ordered by the District Court as aforesaid, be, and the same is hereby, modified and changed so as to restrain the defendant as therein provided, until the 20th day of January, 1886, and no longer, and that said injunction expire and be of no force and effect on and after said 20th day of January, 1886. (Record, pages 31–2.

From this order the railroad company appealed to the Supreme Court. The latter Court made the order found on page 42 of the Record, as follows:

"This cause came on to be heard upon the transcript of the Record of the Circuit Court of Belmont County and was argued by counsel; on consideration whereof it is ordered and adjudged by this Court that the judgment of the said Circuit Court be, and the same is hereby, affirmed."

Counsel for plaintiff in error contends that the Record in this injunction case was either conclusive as against the Baltimore and Ohio Railroad Company, of the right of the City of Bellaire to extend Belmont street across this property, or at any rate was competent evidence upon the issue submitted to the jury in the first question which the Court required them to answer. We submit that the utmost effect of the orders entered in the injunction case below, or on appeal, was to decide that the petitioner did not make out a case that would justify the Court in interfering by injunction *in limine.*

The authority of the city to extend the street is derived from sections 2233 *et seq.* of the Revised Statutes of Ohio, printed as an appendix to this brief.

The provision of section 2233 is as follows:

"The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, where such appropriations will not unneces-

sarily interfere with the reasonable use of such road or land by the railway company."

Sections 2234 and 2235 require the passage of an ordinance or resolution by two-thirds of the members elected to the Council by yea and nay vote, etc. The other sections provide for the application to the Court of Common Pleas or Probate Court of the county, and the conduct of the proceedings in Court.

Under this law it seems clear that all questions with reference to the appropriation and compensation to be made are properly within the cognizance of the Court to which the application is made, and that no Court should interfere by injunction, certainly not except in the case of a clear abuse of the power conferred by the statute. The petitioner's pleading in the injunction case seems to recognize this rule and seek to avoid it by basing the petitioner's claim to relief upon the bad faith of the city authorities and the utter destruction of the railroad company's use.

If the plaintiff in error wished to rely on this Record as an estoppel or *res adjudicata*, then the matter was not properly presented to the Court. The only reference to this matter, in the pleadings, is that contained in the last paragraph of the reply. (Record, page 18.) The legal effect of this record was for the Court to decide, but the plaintiff in error did not present the matter to the Court and ask a ruling thereon, and the exception taken below was not to the refusal of the Court to make a ruling on the legal effect of the Record in question, as an estoppel or adjudication between the parties. The exception taken, as will appear from the bill of exceptions, (Record, page 25,) was to the refusal of the Court to permit this record to go to the jury as evidence before them. The present Record does not contain the testimony on either side, but even without that it seems perfectly clear that the plaintiff in error could not have been injured by the ex-

clusion of this record, and that it would have been error to admit it before the jury.

The ordinance, in pursuance of which the present proceeding was instituted, was passed on the fifth day of April 1887, nearly two years after the hearing in the Circuit Court in the injunction case. Clearly the facts to go to the jury under an application made in pursuance of an ordinance passed in 1887, must be the facts as they exist at the date of the trial upon that application and not the facts that existed two years prior to the passage of the ordinance. If this be so, none of the findings or other matter contained in the record of the injunction case, could be competent evidence before the jury in the present case.

We submit, therefore, that the Court below committed no error in excluding the record in the injunction case.

THIRD—THE FIRST QUESTION SUBMITTED TO THE JURY.

The second bill of exceptions contains the judge's charge and the exceptions thereto. (Record, page 43.)

These points of exception range themselves naturally under two heads, corresponding to the first and third questions submitted to the jury. The first question submitted was: "Would the appropriation of the premises in question unnecessarily interfere with the reasonable use of the land and road of the defendant companies or either of them?" The exception noted is in the following language: The plaintiff excepted "also to that part of the charge that submitted the question as to the proposed appropriation unnecessarily interfering with the reasonable use of the land by the defendants." This general exception, we had supposed, was to the action of the Court in submitting the first question to the jury at all. The counsel for plaintiff in error, on page 13 of his brief, so interprets the exception, but on pages 17, 18 and 19 he seems to interpret it as an exception to the lan-

guage of the judge in submitting the first question to the jury.

1. Was the first question submitted to the jury a proper one to be submitted at all? It is contended that it was not proper because, (*a*) the passage of the ordinance by the council concluded the question; and, (*b*) because the question was in its nature a preliminary one not to be submitted to the jury, but to be decided by the Court.

(*a.*) The special provision found in section 2233, that "the power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of such road or land by the railway company," was first enacted by the Act of April 28th 1873, which is printed in the appendix to this brief. That Act amended section 508 of the Municipal Code of May 7th, 1869, (also printed in the appendix,) by inserting in section 508 the following: "The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks and lands held or owned by railway companies, provided, such appropriation shall not unnecessarily interfere with the reasonable use of such road or land by the railway company."

Prior to 1873, the only restriction upon the general power of municipal corporations, under the Act of May 3, 1852, and the Municipal Code of 1869, to appropriate for street purposes land already dedicated to a public use, was that enforced by the general doctrine, that a general power to take for any public use will not be construed to authorize the taking of land already employed for another public use, where the second use will necessarily destroy the first. The discretion of the municipal authorities in determining the amount of land to be taken, and the

necessity of the taking, could not be reviewed if exercised in good faith.

Iron R. R. Co. vs. City of Ironton, 19 Ohio State, 299, (1869.)

Little Miami, &c., R. R. Co. vs. City of Dayton, 23 Ohio State, 510, (1872.)

Did the proviso in the Act of 1873, which we have quoted, add anything to the previous law, except to require the municipal council to decide that the appropriation contemplated would not unnecessarily interfere with the reasonable use of the land by the railroad company? The proviso is clearly enacted for the protection of the company whose lands are to be appropriated, and it would be a most remarkable construction that would leave that protection to the discretion of the corporation seeking the appropriation.

Taking it as demonstrated then, that the question whether the appropriation will unnecessarily interfere with the reasonable use of the land by the railway company must be decided by somebody other than the municipal corporation, the remaining question is:

(*b.*) Should the decision of this question be left to the jury? The question is one purely of fact. Its decisions involves an examination of all the facts as to the character and method of the use by the municipal corporation and the character and method of the use by the railway company.

Its proper presentation requires the introduction of all the testimony, and much of the same testimony that must be produced in trying the question of damages. To seek to try it before the judge as a preliminary question would be to try the case twice over, once before the judge on this question, and again before the jury on the question of damages.

The record shows that the plaintiff in error tried the case below on the theory that this question was one proper

for the jury to decide. After the jury were impaneled, the plaintiff, upon leave first obtained, amended its original application for appropriation by inserting the averment, "that the extension of Belmont street, across the lands and tracks of said defendants, as proposed in said application, will not unnecessarily interfere with the reasonable use of said land or tracks by said defendants, or either of them." (Record, pages 19 to 20.) To this amendment the defendants filed a reply, denying all its averments. (Record, page 20.)

The plaintiff in error, therefore, by its own pleading, framed this issue of fact for submission to the jury.

"A party can not take exception to the ruling under which a trial has been conducted by his procurement or with his acquiescence."

New York Elevated Ry. Co. vs. 5th National Bank, 135 U. S. 432.

2. The particular language of the charge on this first question, to which the plaintiff in error objects, is not specified in the bill of exceptions, and we submit that the general exception taken is not sufficient to bring the language of the charge before this Court for review.

Connecticut Life Ins. Co. vs. Union Trust Co., 112 U. S. 250.

Burton vs. West Jersey Ferry Co., 114 U. S. 474.

Chateaugay Iron Co. vs. Blake, 144 U. S. 476.

The brief of the counsel for plaintiff in error, on pages 18 and 19, after quoting portions of the charge, makes this comment: "Under these instructions the finding would necessarily be that the use theretofore made by the defendants of the parcel of land which it was proposed to appropriate was in all respects a reasonable use, and that any interference with such use that could be avoided at whatever cost, was an unnecessary interference."

Part of the language quoted is used with reference to the question of damages, but it is impossible to follow such general objections as that contained in this comment of counsel.

There is no testimony in the Record and nothing to show even what the testimony tended to prove. Hence if there is any conceiveable case to which the law as stated by the Court, would be applicable, the presumption is that that was the case upon which the jury were charged. This Court can know the facts on which the charge was based only from the references in the charge itself and the verdict of the jury. From those sources it appears that the proposed opening of Belmont street at grade, across the railroad company's yard, would inflict damage upon the railroad company to the extent of $40,000, exclusive of the value of the land; that on the other hand, this street could be opened across the railroad company's property by means of a bridge, at a cost estimated by the railroad company's witnesses as between $17,000 and $19,000, and by the city's witnesses, as between $30,000 and $40,000.

The question for the jury then, is whether when the crossing by bridge can be had for $40,000 at the utmost, the opening of a grade-crossing, at the cost of $40,000, excluding the value of the land and the cost of construction, is necessary or unnecessary. This question is not affected by the question whether the $40,000 of damage done by the grade crossing is to be borne by the city of Bellaire or by the railroad companies. For the purposes of this case, it is conclusively settled that damage to that amount will be done, to be borne either by the railroad companies or the city. In deciding the question whether the appropriation unnecessarily interferes with the reasonable use of the property by the railroad company, the amount of damage done and other expense incurred by the proposed method of crossing, by whomever to be paid, must be compared with the cost of the other feasible methods of crossing.

The statute is intended both to save the city from the payment of a greater sum for an inferior crossing than it would have to pay for a better crossing, and also to protect the railroad company from the infliction, by the proposed method, of a damage greater than the cost to the city of some better or equally feasible method. Therefore we say, that as the facts appear in this record, the Court could have permitted no other answer to the first question submitted than that given. If the jury had found, in answer to the third question, that the damage to the railroad company was $40,000, exclusive of the value of the land, and it had appeared at the same time, from the city's own evidence, that the bridge crossing would cost less than $40,000, a finding in answer to the first question, that the appropriation did not unnecessarily interfere, would have been inconsistent with the finding on the third question, and against the evidence on both sides. If, therefore, the facts were, what from the record here they conclusively appear to have been, then the finding on the first question followed necessarily from the facts, and the Court might well have directed the jury to find as they did, in the absence of any request by the plaintiff in error, raising the question whether a bridge-crossing would be equally as good for travel as the proposed grade-crossing. The Court, however, did in fact leave all these questions to the jury. There is nothing in the language which could have misled the jury, and the verdict shows findings perfectly consistent with each other. Certainly, as the facts are shown in the record, the plaintiff in error could have suffered no injury from any of the statements in the charge which are criticized in the brief of its counsel.

Fourth—Exceptions to the Charge on the Third Question Submitted to the Jury.

The third question is as follows: "What is the extent in value of the impairment of the defendants' yard for the

purposes for which it is used, by the appropriation of the land in question and the extension of the street across it?" (Record, page 22.)

The exceptions to the charge relative to this question are in the following language: "Plaintiff, by its counsel, then and there excepted to said charge with reference to the rights of said railroad companies on account of the ownership of the land in fee, to the elements of damage as laid down by the Court, and to the instructions as to damages to the whole yard." (Record, page 43.)

There is also a notation of exception at the close of the charge (Record, page 52,) as follows:

"Exception by plaintiff's counsel to ruling as to the rights of the company being owners in fee of the property and the elements of damage as applying to the whole yard.

"Court: Gentlemen, I apply it to the whole yard just so far, and only so far, as the value of the whole yard may in your opinion, be impaired by this crossing; and if it be impaired, then the company must be paid for it."

Here again the exceptions do not point out definitely and specifically the portions of the charge excepted to, and as we submit are not sufficient to enable this Court to review the language of the charge, under the decisions already cited. No special requests to charge are contained in the Record, and there is nothing to show wherein the law, as laid down by the Court, differed from the law to which the plaintiff in error considered itself entitled. But passing over the objection of the insufficiency of the exceptions, for the sake of the argument, let us see what they can possibly amount to.

None of the testimony being included in the Record, no objection to the charge can be sustained on the ground that it was not proper as applied to the testimony. The objections cipher themselves down to this: that the Court erred in instructing the jury that they were to consider

the impairment in value of the *whole* yard. The contention of the plaintiff in error is that the damages should be confined to the value of the land actually occupied by the street. That where a portion only of a piece of property is taken for public use, the owner must be compensated not only for the value of the land taken but for the diminution in the value of the whole piece by reason of the taking, is a rule so well settled and so universally applied as well in condemnation proceedings by municipal corporations in Ohio as in condemnations by other corporations, that it is useless to cite authorities to establish it.

The contention here is that the rule does not apply when a portion of a piece of property owned by a railroad company is taken, simply because the property is that of a railroad company. The property in question in this case is what is called a "railroad yard." The railroad is a carrier of cars and carloads just as it is a carrier of freight in less than carloads. This yard is a place of storage and transfer of cars and carloads just as the company's warehouses are places of storage and transfer of freight in less than carloads. The same rule that would enable the city of Bellaire to take a part of this storage place for cars, without paying as compensation the diminution in value of the whole of it, would enable the city to take a part of the railroad company's warehouse without paying as compensation the diminution in value of the whole warehouse as a warehouse.

As the Record stands in this case, the verdict of the jury is conclusive that the appropriation sought will diminish the value of this yard, as a whole, to the extent of $40,000; the verdict also ascertains the value of the land actually occupied by the street to be $1,200. The contention of the plaintiff in error is that the city of Bellaire can do $41,200 worth of damage to the railroad company and pay $1,200 compensation therefor. The instructions of the Court are that the measure of damages is the diminution in value of the whole of this storage place, as

a storage place, caused by the appropriation of a part of it. No other rule has ever been laid down in Ohio. In the case of Railway vs Railway, 30 Ohio State, 604, which was a case of condemnation of a crossing by one railroad over another, it is expressly laid down that in addition to the value of the land occupied, "If, in any given case, there are other consequential injuries, not provided for by the Act of 1860, incident to the appropriation, they may be considered if they are the cause of present and direct damages to the remaining property."

30 Ohio State, 626.

The expenses imposed by the police regulations of the State are not elements of damage, but it does not follow that the uses to which the whole piece of land in question is put, are to be ignored in estimating the diminution in value of the whole piece, in the case of property used for railroad purposes, any more than the case of property used for other purposes. If a portion of an individual's warehouse property be taken, the damage to the whole property must be considered; the same rule applies if a portion of a railroad company's warehouse property be taken. In either case it is not the value of the property as a farm or as a vacant lot that is considered, but the value of the property for the use to which it is being put, or that to which it is best adapted. In the present case the property is improved property, adapted by its improvements to use for particular purposes. The appropriation of a part of it, which prevents or interferes with the use of the whole for this purpose, necessarily impairs the value of the whole, and such impairment is a present and direct damage to the remaining property, caused by the appropriation. We submit that the Court below was right in applying to this property the same rule of damages that would apply to any other.

FIFTH. It remains only to call the attention of the Court to the verdict and judgment. The verdict was a special

one, and the jury was directed by the Court to answer all the questions "in order to avoid in any event the necessity of another trial upon all the questions." (Record, page 49.)

The verdict on the first question submitted to the jury having found that the appropriation of the premises in question would unnecessarily interfere with the reasonable use of the land and road of the defendant companies, the judgment of the Court was based on that finding.

If any errror should be found in the action of the Court affecting the finding on the first question, but no error should be found to affect the finding on the third question, then we should ask the Court to remand the case with instructions to enter a proper judgment on the findings of the jury in answer to the second and third questions, and so save the necessity of a trial *de novo.*

JOHN K. COWEN,

JOHN H. COLLINS,

HUGH L. BOND, JR.,

Counsel for Defendants in Error.

APPENDIX.

Revised Statutes of Ohio. Title XII, Div. 7, Ch. 3.

SEC. 2233. (Additional purposes for which appropriation may be made.) The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of such road or land by the railway company; such power may also be exercised where it is necessary to acquire the right of way to, or additional ground for, the enlargement or improvement of the public works herein specified; and whenever material is required for the construction, improvement or repair of any such works, the corporate authorities are empowered to appropriate and take the same, and for this purpose they may go outside the corporate limits. (70 v. 175, sec. 508.)

SEC. 2234. (Concurrence of two-thirds of council necessary for condemnation, etc.) No improvement requiring proceedings for the condemnation of private property shall be made without the concurrence in the by-law, ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council. (66 v. 236, sec. 511.)

SEC. 2235. (Declaration of purpose to appropriate, etc.) When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated; and on the passage of such resolution,

the yeas and nays shall be taken and entered on the record of the proceedings of the council. (66 v. 236, section 512.)

SEC. 2236. (Application to Court, etc.) Upon the passage of the resolution by the requisite majority, application in writing shall be made to the Court of Common Pleas of the proper county, or to a judge thereof in vacation, or to the probate Court of the county, which application shall describe, as correctly as possible, the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property. (66 v. 236, section 513.)

SEC. 2237. (Service of notice to owners of property.) Notice of the time and place of such application shall be given personally in the ordinary manner of serving legal process, to all the owners or agents of the owners of the property sought to be appropriated, resident in the State, whose place of residence is known; and to all others, by publishing the substance of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of the application, in some newspaper of general circulation in the county. (72 v. 25, sec. 514.)

SEC. 2238. (Court to fix time for inquiry, etc.) If it appear to the Court or Judge that such notice has been served five days before the time of the application, or has been published as provided in the preceding section, and that such notice is reasonably specific and certain, the Court or Judge may set a time for the inquiry into and assessment of compensation, by a jury of twelve men, unless all the parties agree upon a less number, who shall be duly sworn to discharge that duty. (66 v. 236, sec. 515.)

SEC. 2239. (Special term of Court may be had.) If the application be in the Court of Common Pleas, and such Court is not in session on the day fixed for the inquiry

and assessment of compensation, the judge of the Court of Common Pleas of the subdivision in which the property is situated, or, in case of his absence, interest, or disability, any other judge of the Court within the district, shall hold a special term of Court for the purpose of hearing and determining such inquiry and assessment, and shall direct a jury to be summoned for the purpose of making such inquiry, in the same manner that petit jurors are summoned in the Court of Common Pleas for other purposes. (66 v. 237, sec. 516.)

Sec. 2245. (How jury to return assessment; open and close of case.) The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to each owner may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land; the owner shall have the right to open and close the case in the introduction of evidence and the argument, but not more than two counsel shall be heard for the city or the owners of any separate lot or tract, unless the Court, for good cause, direct otherwise; * * *.

An Act

To amend section five hundred and eight of an Act entitled "An Act for the organization and government of municipal corporations," passed May 7th, 1869.

Section 1. Be it enacted by the General Assembly of the State of Ohio, That section five hundred and eight of the Act entitled "An Act to provide for the organization and government of municipal corporations," passed May 7, 1869, be so amended as to read as follows:

Sec. 508. The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks and lands held or owned by railway companies: Provided, such appropriation shall not unnecessarily interfere with the reasonable use of such road or land by the railway company. Said power